STATEMENT OF C. R. EGGERS, CHIEF OF POLICE, GLENDALE, CALIFORNIA PRESENTED TO THE JUDICIARY SUBCOMMITTEE ON ILLEGAL SEARCHES AND SEIZURES AND THE LAWS OF ARREST AT ITS HEARING IN LOS ANGELES, JANUARY 12, 1955.

In his letter of invitation, the Chairman of the Committee propounded two specific questions.

(1) Should the exclusionary rule be waived so far as it applies to narcotic offenses?

(2) Is remedial legislation necessary, particularly as it might relate to requesting the Governor to open the call at the March 1956 session of the Legislature?

In answer to the first question, I believe that it would be a mistake to waive the exclusionary rule in any particular offense. Since the Supreme Court has invoked the rule, I believe that the only practical answer is the enactment of legislation which clearly defines "unreasonable" searches and seizures, and clearly outlines the methods to be used by peace officers in gathering evidence when investigating criminal activity.

In answer to the second question, not only is remedial legislation necessary, the Supreme Court in its discussion of the Cahan Case indicated that rules should be established by legislative enactment. It is also imperative that legislative action be taken as soon as possible. However, unless a sound, comprehensive program which has a good chance of passage can be presented in March it would be better to wait until the long session in 1957.

It has been suggested that all that is necessary is the enactment of legislation declaring that any evidence, no matter how obtained, would be admissable in criminal prosecution in this State. Of course, this would effectively negate the exclusionary rule established by the Cahan decision and re-establish the rules and procedures which we followed for

many years. On the other hand I cannot feel that such legislation would be at all in keeping with the spirit and intent of constitutional provisions.

The Constitution guarantees security against unreasonable search and seizure of the person as well as his property. In the matter of the seizure of the person (arrest) we have, by legislation, established a set of rules (the laws of arrest) which give the peace officer all the necessary freedom of action. At the same time these rules adequately protect the innocent from any type of embarrassment. Legislation should be enacted to establish the same kind of rules covering the search for and seizure of physical evidence.

Along this line I have several specific suggestions to offer. The first of these have to do with search warrants. We hear many officers complaining that magistrates are too reluctant to issue search warrants. In many cases these complaints would seem to be justified. However, the sections of the Penal Code dealing with search warrants are worded in such a negative manner that the courts have very little discretion. Some changes in the wording of these sections to give them a more positive meaning would undoubtedly change the attitude of the judges.

An example of what I mean occurs in Section 1525 P.C. which states, "A search warrant cannot be issued but upon probable cause," etc. Most judges interpret this in the strictest sense and for all practical purposes require personal knowledge on the part of the applicant of the exact location of the material which is the subject of the search. If this section was to read, "A search warrant may be issued upon probable cause," etc. or something similar, I am sure the judges would interpret it more liberally and would act accordingly.

Another example is section 1533 relating to endorsement for night time service. The section states, "The magistrate must insert a direction in the warrant that it be served in the day-time, unless the affidavits are positive that the property is on the person or in the place to be searched, in which case he may insert a direction that it be served at any time of the day or night.

Many judges interpret this to mean that night time service should not be permitted unless extreme exceptional reasons for it exist. Here again a slight change in the wording would give the judges more discretion and they would properly exercise it.

5

Another stumbling block is the reluctance of the judges to issue search warrants unless they at least talk to an informant who has personal knowledge of the location of the evidence in question. In many cases, especially those involving narcotics, the informant is either an underworld informer or an undercover agent. In either case it would often be extremely detrimental to the specific investigation or to future investigations to have the informant appear even in the close proximity of the court much less have his name appear on the affidavit. In fact, an underworld informer would probably refuse to appear, and if he did his personal safety and possibly his life might be jeopardized. This type of situation would be overcome by the addition of another section which would specifically permit a peace officer to request a search warrant on "information and belief" in the same manner as a criminal complaint is filed under the provisions of Section 806 of the Penal Code.

6

Some specific provision should also be made permitting peace officers

to make searches and seizures without warrants. Very often, especially in narcotic cases, circumstances are such that there is not sufficient time between the receipt and verification of the information and the necessity to move in to obtain a warrant. Legislation following the general provisions of subsections 3, 4 and 5 of Section 836 of the Penal Code but relating to search for and seizure of physical evidence in felony cases would certainly seem to be in order.

Enactment of legislation along these lines would remove the unreasonable restrictions set up by the Cahan decision. It would also provide the necessary set of "ground rules" which have long been lacking and which law enforcement needs to properly fulfill its mission of protecting society from the ravages of the criminals. At the same time society will be adequately protected against the overzealous peace officer.

It has also been suggested that some changes in the laws of arrest would help to remedy this situation. It is my belief that the laws of arrest in themselves are quite adequate and provide all the tools necessary for the peace officer to do the job. There are one or two procedural changes however which to my mind would speed up the work and cut down some of the red tape.

One of these procedural changes has to do with the use of citations in bringing certain types of offenders before the court. Chapter 537 of the statutes of 1955 added sections 853.1 to 853.4 to the Penal Code. This legislation enables Counties to enact local ordinances providing for the use of citation procedure, common in motor vehicle law enforcement, in the enforcement of County ordinances. It would be very beneficial to city police departments if this same procedure were made

available in the enforcement of city ordinances.

Another suggestion that has been made previously, I believe by District Attorney Roll, is that Chiefs of Police and other persons in charge of local jails be authorized to release prisoners, who have not yet been to court, without bail, on the prisoner's written promise to appear in court. This would be a further extension of the principles of field citations and would certainly be a great benefit to many citizens who happen to fall into the clutches of the law and who are not in a financial position to purchase bonds or otherwise post bail.

C. R. EGGERS
Chief of Police
Glendale, California

Report not in transcript

CHAMBERS OF
The Superior Court
LOS ANGELES, CALIFORNIA
STANLEY MOSK, JUDGE

January 9, 1956

Honorable H. Allen Smith
Member of the Assembly
530 West Sixth Street
Los Angeles 14, California

Dear Assemblyman Smith:

I have delayed responding to your invitation of December 15 to appear before the Assembly Judiciary Subcommittee in order to make every effort to be present.

Unfortunately, my criminal calendar in the Santa Monica Court is so crowded that I find I can not take a half day off for the purpose of appearing before your committee.

In addition, I feel I have nothing of any great value to contribute other than to express my personal view that the Cahan decision is a wise and proper ruling on evidence and that it should be maintained.

I am enclosing herewith a copy of an address I made to Town Hall on July 26, 1955, in which I expressed my views at considerable length on this important decision.

You will note particularly my reference to the fact that courts have always respected the Constitutional prohibitions against forced confessions, double jeopardy, deprivation of counsel, excessive bail, cruel and unusual punishment, denial of trial by jury, and other enumerated personal guarantees. I see no justification for making any exception for unreasonable searches and seizures. It has never been clear to me why any one Constitutional prohibition is entitled to less sanctity and respect than any other.

I concede that there may be some difficulty in obtaining evidence in some types of cases if law enforcement officers must themselves obey the law. But as I stated in my Town Hall address, officers may now "find it necessary to use their heads instead of hobnailed boots".

In the event there are any further hearings after this week, and you still desire me to express my views at greater length, I shall certainly attempt to do so.

Respectfully yours,

Stanley Mosk
Judge

SM:C

Exhibit III

"Means and Ends in Law Enforcement"
Superior Judge Stanley Mosk
Town Hall, July 26, 1955.

On April 27, 1955, the Supreme Court of the State of California announced its decision in the case of People v. Cahan.[1] An atomic explosion would not have sprayed as much fall-out as this 4-3 opinion created in the field of criminal law.

On the one hand, many thoughtful legal authorities and students of the law, as well as civil libertarians, rejoiced at what has been termed a return to the spirit of the Constitution in the field of law enforcement. On the other hand, some law enforcement officials have been unrestrainedly critical of the Court and the shackles which it has purportedly placed on the police in their war on crime.

Theretofore in California courts, any evidence against a defendant in a criminal case was admissible in the trial against him, regardless of how obtained -- legally or illegally. Theoretically, a law enforcement officer who violated the law to obtain the evidence could be punished for his illegal acts, but the fruits of those acts were available against the defendant. According to the new rule, evidence illegally obtained is no longer admissible in California courts of law. This exclusionary rule has long prevailed in the federal courts and in some, though not a majority, of the state courts.

The conundrum thus posed to many thoughtful citizens is: Are we concerned exclusively with apprehension of criminals, or do we reflect upon preservation of rights belonging to all of us? This is somewhat like the early

---

1. 44 A. C. 461.

bird who catches the worm: everyone heaps praise on the virtues of the early bird, but no one sheds a tear for the fate of the early worm.

In his majority opinion in the Cahan case Justice Traynor confessed that he felt obliged to reverse his former position and now joined Justices Carter and Schauer, who have consistently maintained in dissents that evidence obtained in violation of Constitutional guarantees is inadmissible.

In baseball an umpire never changes his decision. On occasion, judicial umpires have been less reluctant to reach what are euphemistically termed revised conclusions. Traynor's forthrightness is matched by the classic expression of Justice Frankfurther: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[2] Justice Jackson once found himself deciding a matter as a judge directly contrary to an opinion he had rendered some years previously as attorney general.[3] He wrote a concurring opinion in the nature of an explanation, pointing out that precedent "is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others." He quoted a judge, who "extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error can furnish no ground for its being adopted by this Court.' (Added Jackson) If there are other ways of gracefully and good-naturedly

---

2. Henslee v. Union Planters Bank, 335 U. S. 595.
3. McGrath v. Kristensen, 340 U. S. 162.

surrendering former views to a better-considered position, I invoke them all."

Some authorities have questioned this right of the Supreme Court to alter a long-accepted legal rule. Justice Frankfurter commented in 1939: "Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation."[4]

Complete reversals are not entirely uncommon, and certainly not necessarily unwise. For a classic example, Chief Justice Marshall in the landmark case of McCullough v. Maryland[5] used the phrase that "the power to tax involves the power to destroy". Over a century later, Justice Holmes brushed this seductive cliche aside with one stroke of his pen. Said he, "The power to tax is not the power to destroy while this Court sits."[6]

Cahan was convicted of bookmaking. It may seem like a tortuous path from English barons in 1215 to Los Angeles bookmakers in 1955, but the relationship between the two is not as tenuous as may seem at first blush. Neither medieval barons nor modern bookmakers are noted for their civic consciousness, but both unwittingly have made notable contributions to modern jurisprudence and to the rights of all free men.

When the barons wrested from King John the Magna Carta, the 39th article of that great document provided that "No freeman shall be taken and imprisoned or disseised

---

4. Graves v. New York ex rel O'Keefe, 306 U.S. 466, 487.
5. 4 Wheat. 316.
6. Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 223.

or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land." Thus there was planted in the stream of English law the germ of an idea which has made an incalculable contribution to the development of our institutions -- "the law of the land" -- per legem terrae.

In the next century, about 1354, a statute of Edward III made it clear that the protection of Chapter 39 of the Magna Carta applied not only to landed gentry but to all men without limitation -- "of what estate or condition that he be". This same statute first used the revered phrase that was adapted by the framers of our Constitution: No man should suffer deprivation in any way except "by due process of law".

The application and identity of the phrases "law of the land" and "due process of law" as inalienable rights of the individual became widely accepted during the early 17th century as a result of the writings of Coke and of John Locke, and ultimately achieved such acceptance as to compel Parliament in 1640 to abolish the infamous Star Chamber.

These ideas came to America as a part of the heritage of our early English settlers, and we had here a soil on which they could flourish. The same phrases were used by James Otis in his great argument in the "Writs of Assistance" case in 1761. They were emphasized again and again by Thomas Paine, John Adams, Samuel Adams, and other revolutionary pamphleteers.

Never should memories dim to the historic fact that our Constitutional guarantees were conceived for the protection of the individual against abuses by his own

government. Essential though law and order may be, ominous though the inroads of crime may be, respect for our American legacy compels us to shelter the individual from an overzealous law enforcement agency.

What were the facts in the Cahan case? The defendant and fifteen other persons were charged with conspiring to engage in horse-race bookmaking in violation of Section 337a of the Penal Code. Charles H. Cahan was found guilty and was granted probation for a period of five years on condition that he spend the first ninety days in the County Jail and pay a $2,000 fine. He appealed.

According to the evidence reviewed by the Supreme Court, a police officer, after securing permission of the Chief of Police to make microphone installations at two places occupied by the defendants, entered the house during the nighttime, together with two other officers, through the side window of the first floor, and placed a listening device under a chest of drawers. Another officer made recordings and transcriptions of the conversations that came over wires from the listening device to receiving equipment installed in a nearby garage. A month later another officer surreptitiously installed a similar device in another house, and receiving equipment was also set up in a nearby garage.

The evidence acquired from the microphones was not the only unconstitutionally obtained evidence introduced at the trial over defendants' objection. In addition, there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants.

The following is an exact quotation from the opinion of the Supreme Court: "The forcible entries and seizures were candidly admitted by the various officers.

For example, Officer Fosnocht identified the evidence that he seized, and testified as to his means of entry: '. . . and how did you gain entrance to the particular place? I forced entry through the front door and Officer Farquarson through the rear door. You say you forced the front door? . . . Yes. And how? I kicked it open with my foot . . .' Officer Schlocker testified that he entered the place where he seized evidence 'through a window located I believe it was west of the front door . . . . (W)hen you tried to force entry in other words, you tried to knock it (the door) down is that right? We tried to knock it down, yes, sir. What with? A shoe, foot. Kick it? Tried to kick it in, yes. And then you moved over and broke the window to gain entrance, is that right? We did.' Officer Scherrer testified that he gained entry into one of the places where he seized evidence by kicking the front door in. He also entered another place, accompanied by Officers Hilton and Horral, by breaking through a window. Officer Harris 'just walked up and kicked the door in' to gain entry to the place assigned to him."

Continued the court, "Thus, without fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the City employs and pays them."

No twentieth century police chief or prosecutor would insist upon introducing into evidence a forced confession. And for many years there has been little question

about the rights of defendants in situations involving double jeopardy, deprivation of counsel, excessive bail, cruel and unusual punishment, right to public trial, right to trial by jury, protection against ex post facto laws, and even -- with the occasional exception of proceedings before legislative committees -- the immunity against self-incrimination. But unreasonable searches and seizures seem to remain a blind spot in the perception and perspective of many state courts and numerous law enforcement agencies. Why this one Constitutional prohibition merits less respect than the others is difficult to comprehend.

Let us hurriedly and superficially review the history of evidence admissibility in cases before the highest Court of the land.

In 1914 the United States Supreme Court ruled that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.[7]

In 1949 the United States Supreme Court decided that the due process clause did not forbid a state court to admit evidence obtained by an unreasonable search and seizure.[8] Said the Court in rationalizing this distinction: "The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

Debatable though that concept may be, it apparently convinced five out of nine of the justices, although Justice Black wryly observed that "A state officer's knock

---

7. Weeks v. U. S., 232 U. S. 383.
8. Wolf v. Colorado, 338 U. S. 25.

at the door as a prelude to a search, without authority of law, may be, as our experience shows, just as ominous to ordered liberty as though the knock were made by a federal officer."

An indication that limitations upon conduct of state officers would be imposed by the U. S. Supreme Court was contained in the case of Rochin v. California.[9] In that case, three Los Angeles County deputy sheriffs forced open the door to Rochin's room. Inside they found him sitting partly dressed on the side of the bed, upon which his wife was lying. On a night stand beside the bed, the deputy spied two capsules. When asked, "Whose stuff is this?", Rochin seized the capsules and put them in his mouth. A struggle ensued, in the course of which the three officers jumped upon him and attempted to extract the capsules. Being unable to do so, they handcuffed Rochin, took him to a hospital, and at the direction of one of the officers, a doctor forced an emetic solution through a tube into his stomach against his will. This stomach pumping produced vomiting, and in the vomited matter were found two capsules which proved to contain morphine. Rochin was tried and convicted, the chief evidence against him being the two capsules.

The United States Supreme Court reversed this conviction on the ground that due process had been denied. Said Justice Frankfurter: ". . . The proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. . . This course of proceeding by

---

9. 342 U. S. 165.

agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of Constitutional differentiation. It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

Justice Douglas, who concurred with the unanimous decision, pointed out however that this type of evidence, which so revolted the sensibilities of the Court, would be admissible in the vast majority of the States of the Union.

It appearing in the Rochin case that the United States Supreme Court finally might take the plunge at prohibiting illegal evidence from being admitted in state courts, the case of Patrick E. Irvine, a Los Angeles bookmaker, went up to the high Court.[10] The evidence in the Irvine case again shocked the Court. While Irvine and his wife were absent from their home, a police officer arranged to have a locksmith go there and make a door key. Two days later, officers and a technician made entry into the home by the use of this key and installed a concealed microphone. A hole was bored in the roof, wires were strung to a neighboring garage, and officers were posted in the garage to listen. As Justice Jackson pointed out:

"Each of these repeated entries of petitioner's home without a search warrant or other process was a trespass and probably a burglary, for which any unofficial person should be, and probably would be, severely punished. Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or

---

10. Irvine v. California, 347 U. S. 128.

the busybody. That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government . . ."

Repugnant though this conduct was to the Court, it declined to hold categorically that the California court should have excluded evidence obtained in this manner. One justice, Clark, voted with the 5-4 majority because he felt strict adherence to the rule permitting any kind of evidence "may produce needed converts for its extinction". That was a polite way of saying things must get worse before they can get better.

Even though the Irvine conviction was upheld, the Court included a subtle invitation to the states to take the initiative in withdrawing recognition of lawless enforcement of the law. The majority opinion pointed out that thirty-one states at this time were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it, and added: "Now that the . . . doctrine is known to them, state courts may wish further to reconsider their evidentiary rules."

It must be conceded, however, that Justice Jackson in the Irvine case cynically concluded: "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."

On the other hand, Justice Douglas's dissent

quoted from the late Justice Murphy that "The conclusion is inescapable that but one remedy exists to deter violations of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing Constitutional demands in his instructions to the police."

Let us briefly examine some of the contentions in favor of admissibility of evidence regardless of its source. The first is: this is merely a technical problem of procedure, not crucial enough to merit Constitutional invocation.

It has not been uncommon for people to say: "I don't like the methods, but . . .", thus drawing a line of demarcation between methods and results, or between substance and procedure.

Perhaps there has been less of this type of rationale in the immediate past, since we have witnessed the results of Communist brainwashing. The "confessions" of captured prisoners indicting America of inhuman germ warfare have vividly demonstrated the procedural evils of forced or induced confessions. Many who may have heretofore believed it impossible to extract a detailed confession from an innocent person are now convinced that this can be done by devious techniques.

Thus the importance of procedure looms as great today as it did in our historic past. Dean Erwin N. Griswold of Harvard Law School has put it aptly: "For methods and procedures are of the essence of due process, and are of vital importance to liberty . . . .

"The complaint against the Star Chamber was

chiefly one of bad procedures. Torture is a procedure, and inquisition without charge, forcing a witness to testify against himself, and the other things which were standard practice in the infamous Star Chamber would all fall into the category of procedure . . . . It is, in last analysis, only through procedural rules that the individual is protected against arbitrary governmental action." No, it may not be said that procedure is a mere insignificant technicality.

A second argument against exclusion of illegally obtained evidence is the necessity for its use in apprehending and convicting criminals, or, in other words, that police work will be ineffectual if circumscribed by Constitutional guarantees.

If some law enforcement authorities are to be heeded, the Cahan case in California has had dire results in this unending war against crime. A leader in the attacks upon the Supreme Court and its decision has been the Chief of Police of our community. I have here a question-and-answer interview with the Chief, published in a daily newspaper of Los Angeles, in which he stated that "our Intelligence reports the criminal underworld is rejoicing over the decision." He further stated that there has been a marked drop-off in arrests "directly traceable to the handicaps" under which the police are working as a result of the Cahan decision. He went on to cite statistics which purported to indicate felony arrests dropped 21.2% during the month of May over the average of the preceding four months of 1955. His direct quotation on the reason for this was: "It (the Supreme Court decision) is the only factor we can point to. It is the only thing that is different today than prior to the

Cahan decision."

If that is an accurate reflection of the situation, there should be justifiable concern to all citizens interested in effective law enforcement.

Frankly, I had not noticed any major crime wave in Los Angeles since April 27 of this year, and this caused me to wonder about the accuracy of the Chief's alarming statistics. For the most authoritative source of information, I turned to a copy of his own annual report for the year 1954, and on page 31 noted arrest bookings month by month for the preceding year. Apparently the Chief forgot to mention in his various interviews and radio appearances that criminal arrests traditionally drop markedly during the summer months. Thus, while in January of 1954 there were 17,163 arrest bookings and in April 16,680, the figure dropped in May to 15,626, 14,414 in June, 13,691 in July. If we take the average for January through April of 1954 we find 16,341 arrests. The average for the following five months, May through September of 1954, numbered 14,329 arrests. That represents an appreciable decrease percentagewise.

I think it is therefore fair to state that there is normally a significant reduction in criminal arrests during the summer months in Los Angeles. No one knows whether this is attributable to crime taking a holiday or police officers taking vacations or some other cause, but certainly no action of the Supreme Court may be held responsible in previous years.

In our Los Angeles Superior Court, criminal filings for the first six months of this year totaled 4,204. This is slightly less than the 4,681 for the comparable period in 1954, but more than the 3,961 for 1953. Such fluctuations are not without precedent and in such moderate

degree are not considered noteworthy.

Now, in all fairness it must be said that in certain kinds of crime, the obtaining of evidence will become somewhat more difficult if law enforcement officers must themselves obey the law.

But this and comparable difficulties have not proved insurmountable in the past and should not be in the future to an alert, skilled law enforcement agency. More officers may find it necessary to use their heads instead of hob-nailed boots.

Since the exclusionary rule prevails in federal courts, the Federal Bureau of Investigation has for years operated under that judicial prohibition. Certainly no one would contend that the FBI's usefulness has in any way been impaired by having to adhere to the protection of individual rights guaranteed by the Constitution.

I have here the testimony of J. Edgar Hoover before the House Subcommittee on Appropriations on February 24, 1955. He pointed out that the FBI brought 10,971 cases to trial in 1954. So irrefutable was the evidence which it obtained -- sound, legal, Constitutional evidence -- that there were convictions in 95.8% of the cases.

Perhaps it is unreasonable to expect our local police to operate as efficiently as the FBI, but the record of the federal bureau stands as eloquent rebuttal to those who claim the exclusion of illegal evidence hampers police effectiveness. It may be significant to note that in the curriculum of the FBI National Academy are courses on civil rights and on ethics in law enforcement.

I must state parenthetically that I am using the expression "law enforcement officers" generically, with no intention of being critical of all such agencies. As

a matter of fact many have accepted the Cahan decision and properly proceeded to revise their techniques accordingly, District Attorney Ernest Roll being in the forefront of this group. He has prepared for his deputies a splendid manual on the law of searches and seizures, outlining duties, powers, and limitations in this field.

It must be borne in mind that it is unreasonable searches that are prohibited by the Fourth Amendment and by our State Constitution.[11] Framers of the Constitution recognized that there were reasonable searches for which no warrant was required. For example, no one questions the right, without a warrant, to search the person after a valid arrest. Of course, a search without warrant, incident to an arrest, is dependent initially on a valid arrest.

The authority to search an arrested person is permitted for two reasons, both based upon necessity: first, in order to protect the arresting officer and to deprive the prisoner of potential means of escape, and secondly, to avoid destruction of evidence by the arrested person. From this it follows that officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control.[12]

Another search without warrant considered not unreasonable is that of moving objects, such as vehicles and vessels.[13] This, too, is on the basis of necessity, courts having held that it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

But when we come to search of the premises owned

---

11. Article I, Section 19.
12. United States v. Rabinowitz, 339 U. S. 56.
13. Carroll v. United States, 267 U. S. 132.

or occupied by the arrested person, assuming a valid arrest, many problems do arise. The United States Supreme Court majority by 5-4 has held that search of the arrested person's desk, safe, and file cabinets in the room in which he was seized, was a permissible area of search beyond the person proper.[14] The Court used the words "limited search" and established in that situation these five boundaries: (1) The search and seizure were incident to a valid arrest; (2) The place of the search was a business room to which the public, including the officers, was invited; (3) The room was small and under the immediate and complete control of the arrested person; (4) The search did not extend beyond the room used for unlawful purposes; (5) Mere possession of the objects seized, in this instance forged and altered stamps, was a crime.

The Court dismissed the element of time as a fair test. It was urged by the defendant that the officers had ample time to obtain a valid search warrant and return to the premises. The Court said it could not "agree that this requirement should be crystallized into a sine qua non to the reasonableness of a search", for "it is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant."

Thus it seems clear that there may be reasonable searches, incident to an arrest, without a search warrant. There may also be unreasonable searches with a search warrant. The relevant test is not whether it is reasonable to procure a search warrant, but whether the search itself was reasonable. That criterion in turn depends upon the facts and circumstances, or as the Court put it,

---

14. U. S. v. Rabinowitz, supra.

"the total atmosphere of the case".

Difficult though this ad hoc approach may be, it is not inconsistent with innumerable other statutes and legal proceedings which depend for their validity on interpretation of the word "reasonable".

Desirable though predictability may be in the law, and particularly in the criminal field, it is utterly impossible to anticipate all the factual refinements and nuances that develop. We are not dealing with normal, predictable people in criminal defendants generally, but with inept, inadequate individuals, and the circumstances they generate are abnormal, often bizarre.

Let me illustrate with two recent cases, one of which was tried in my court. Suspecting a certain house to be a hotbed of marijuana traffic, a squad of police descended upon it late at night. Some police officers broke in the back door, others with equal abandon kicked in the front door, still others broke side windows and entered in that manner. Several persons were apprehended inside, and a quantity of contraband was seized.

This entry and seizure was clearly illegal under the Cahan case doctrine. But here comes the real problem. While the premises were still swarming with police officers an hour later, the defendant blithely walked up to the front door and rang the doorbell. Getting no reply, he walked around the side and was about to look under the side porch -- where, incidentally, some of the cache had been found -- when he was arrested. He was searched and three marijuana cigarettes were found in his shirt pocket.

If the arrest was proper, the search of his person was proper, and the cigarettes found could be introduced into evidence. But, argued this defendant, the

original breaking and entering and search of the house were illegal, and every circumstance that flowed therefrom must be illegal and inadmissible.

Several principles enunciated in cases conflicted with the defendant's contentions, however. First of all, only the persons properly in possession of premises may complain about the unlawful entry upon those premises.[15] A casual visitor has no such right.[16] Second, only the person who is illegally seized and held may object.[17] While the persons taken inside this house could complain of that illegal search and seizure, the newly arrived defendant could not do so. Thus the police had information which would cause them to reasonably suspect any late-hour caller at those premises. Acting upon this "probable cause", they had a right to place the defendant under arrest on suspicion, and the arrest being proper, the resultant search of his shirt pocket was also valid.[18] The defendant was convicted of possession of marijuana.

On the other hand, in the Berger case, decided by the State Supreme Court,[19] San Francisco police illegally seized certain records and documents implicating a defendant. There was no question of the impropriety of the seizure, and prior to defendant's trial, the police were ordered to return all records. Along came the trial, and the prosecutor introduced into evidence photostatic copies of all documents which he had been required to return. He was permitted to do so in the trial court, but the Supreme Court reversed the conviction.

---

15. Chicco v. U. S., 284 Fed. 434.
16. In re Nasetta, 125 Fed. 2d 924.
17. Casey v. U. S., 191 Fed. 2d 4.
18. Harris v. U. S., 331 U. S. 145.
19. 44 A. C. 485.

The answer as to what constitutes reasonableness must in the final analysis depend upon the pervasive feeling of society regarding the factors involved. Unfortunately we cannot draw upon any formulated expression of the existence of such feeling. There are no elections or Gallup polls in this field. Nor are there available experts on such matters to guide the judicial judgment. Our Constitutional system, federal and state, makes it the Court's duty to interpret those feelings of society to which the Due Process Clause gives legal protection.[20]

Still another argument against exclusion is that we can depend upon the restraint of police authorities. I am afraid that in this field too many will find, as H. L. Mencken once said, "Conscience is a still small voice that says, 'I hope nobody's looking'."

Finally, the most cogent argument against the exclusionary rule is that under it the defendant's crime and the officer's flouting of Constitutional guarantees both go unpunished. As Justice Cardozo expressed it: "The criminal is to go free because the constable has blundered", and again, "Society is deprived of its remedy against one lawbreaker because he has been pursued by another".[21]

Justice Traynor devastatingly answered that point of view in the Cahan decision: "When, as in the present case, the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the court's lending its aid by allowing the evidence to be introduced . . . Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily

---

20. Haley v. Ohio, 332 U. S. 596, 601.
21. People v. Defore, 242 N. Y. 413, 421.

interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives". And, he continued, an occasional criminal "does not go free because the constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught".

Despite unthinking criticism of it, the Cahan decision is a landmark of progress in California constitutional history. Long after their detractors are forgotten, Chief Justice Gibson, Justices Carter, Schauer, and Traynor will be remembered for their courage and forthright defense of our fundamental guarantees.

In our democracy we have had a skilled professional army, but never have we relaxed civilian control over it. Similarly we have a skilled professional police force, but it must be the servant of the people, never their master. Only in a totalitarian state are police beyond the reach of the law. Perhaps law enforcement may be more deadly certain in that climate, but our founding fathers sacrificed efficiency for liberty. It was a wise choice.

Ex. III-IL

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

COPY

Sacramento, California
May 15, 1955

Summary of a Comment, "The Federal Search and Seizure Exclusionary Rule," 45 J. Crim. L. 51 - #11342

The authors note at the outset that "The Federal law presently is in a state of confusion as a result of the Supreme Court's tendency to treat each case upon its facts without supplying workable standards." However, they set forth what they believe to be certain and discuss the factors which the Supreme Court considers in search and seizure cases and the weight given them.

The Fourth Amendment secures every citizen in his person, premises, papers, and effects from search and seizure which is unreasonable because it is not authorized by law or in accordance with a proper search warrant. A warrant is authorized where there is a showing of probable cause supported by oath or affirmation and the place to be searched and the person or things to be seized are particularly described, that is, general exploratory searches are not permitted.

At common law the admissibility of evidence was not affected by the illegality of the means by which it was obtained, and it was apparently not until 1914 that the Supreme Court announced the rule that use of such evidence is to be precluded upon defendant's seasonable application for the return of things illegally seized or upon motion to suppress (Weeks v. United States, 232 U.S. 383). But the exclusionary rule is limited in scope, in that it does not apply to intrusions by private individuals, and it must be seasonably invoked by a defendant who can show that his own constitutional rights have been invaded, and, of course, the Constitution does not impose the rule on the states.

COPY

Summary of Comment, "The Federal Search and Seizure Exclusionary Rule," 45 J. Crim. L. 51 - p.2 - #11342

A search warrant may not legally issue for seizure of property which has evidentiary value only, whereas it may issue for seizure of property in which the government or public has a paramount interest (Gould v. United States, 225 U.S. 298), i.e., a seizure of contracts, letters, or invoices solely for use in evidence in a subsequent criminal trial is prohibited, but seizure of stolen goods, contraband, "instrumentalities of crime," and articles seized to prevent further frauds is permitted. This distinction has been drawn in some nonwarrant cases too.

The Supreme Court has been very firm in upholding the rule that any indirect or derivative use of evidence unreasonably seized is prohibited. For example, in Silverthorne Lumber Co. v. United States (251 U.S. 385), the company's offices were entered, without a warrant, and all records were seized. A motion to return the property was granted. Thereafter the government had subpoenas issued requiring the corporation to produce originals of the returned documents for use in the trial. In reviewing a contempt conviction for refusal to comply, the Supreme Court held that this was indirect use of evidence obtained illegally originally and was prohibited. Similarly, witnesses may not testify to what they see during an illegal search. But facts once illegally gained can still be proved by other independent sources.

The area in which there is the greatest uncertainty is that of the search without a warrant "incidental" to an arrest. The authors summarize the holdings of the cases in this field as follows:

> "(1) Search and seizure contemporaneously with an arrest is an exception to the constitutional requirement of a warrant and is strictly a limited right. The basic purposes are (a) to protect the arresting officer and to deprive the prisoner of means of escape, (b) to avoid destruction of evidence by the arrestee, and (c) to gather instruments of the crime.
>
> (2) The search and seizure must be proximate to the arrest in time and physical area. The seized articles must either be in plain view, in the immediate custody of the arrestee, or reasonably accessible without exploring, rummaging or

ransacking. Thus, the conduct of the arresting officers is frequently very important. Where they proceed orderly, and where specificity is the mark of the search the risk of impropriety is lessened. However, the limits of permissible search have never been fully defined although there is a working test of reasonableness for each situation.

(3) The nature of the crime and the character of the seized articles usually controls the disposition of a particular case. Consequently, where the crime is of a continuing nature which is aggravated by possession of contraband or articles the mere possession of which is an offense, there is a tendency to uphold the seizure. Further, seizure of papers or articles, which are public in nature or which are invested with a paramount public interest, is more likely to be justifiable than seizure of private papers. In this connection it will be remembered that there is judicial antipathy towards seizure of articles solely for their evidentiary value.

(4) Finally, although constitutional protection extends to both private and public premises, there is a tendency to protect a private dwelling more than a business or public place."

The authors also note that there are other circumstances under which a search may be made without a warrant, for example, upon a showing of probable cause when it is not feasible to obtain a search warrant (Brinegar v. United States, 330 U. S. 160). In Johnson v. United States, 333 U. S. 10, other " exceptional circumstances" recognized were flight of a suspect, situations involving a moving vehicle, or where evidence of contraband is threatened with removal or destruction.

With respect to standing to invoke the exclusionary rule, it is clear that when a defendant does not claim ownership of the premises searched or the property seized he is in no position to resist the admission of seized evidence. There is conflict, however, as to whether interests in both the premises searched and property seized are prerequisites for such standing, but the tendency is to find

sufficient standing if either interest is present.

"Seasonable objection" to unreasonably seized evidence ordinarily means objection made before the trial. However, exception is made where the defendant was unaware of the illegal seizure before the trial.

Ralph N. Kleps
Legislative Counsel

By
Terry L. Baum
Deputy

TLB:fo

Ex. No. VI

MEANS AND ENDS IN LAW ENFORCEMENT
THE BALANCE BETWEEN EFFECTIVE LAW ENFORCEMENT AND THE CITIZEN'S CONSTITUTIONAL RIGHTS - A PUBLIC LAW OFFICER'S POINT OF VIEW

- - - - - - - - - - -

By

ROGER ARNEBERGH, CITY ATTORNEY

OF THE CITY OF LOS ANGELES

- - - - - - - - - - -

Mr. Chairman and Members of Town Hall:

The City Attorney of Los Angeles is the City's legal adviser and advocate in civil matters, but he is also ex officio the City Prosecutor--he prosecutes all misdemeanors committed in the City, whether they be violations of city ordinances or of state law.

Consequently, I am especially concerned with the subject of our discussion today - the balance between effective law enforcement and the citizen's constitutional rights.

Each of us is thankful for these constitutional rights. Each of us, if necessary, would be willing to expend all of our possessions--or even to die--to protect such rights; but would we be ready to do either if some of those concepts were broadened to the degree that law enforcement would be crippled, and the enjoyment of other rights would become more a matter of theory than practice?

This is not as fantastic as it might sound. We, gentlemen, are citizens of a country where the cost of crime to each family is

$495 yearly; where crime costs $1.82 for every dollar spent for education; where crime costs ten times what we give to our churches; where the population of state and federal prisons is increasing seven times as fast as the national population; where over two million serious crimes occur within a year; where a murder, manslaughter, rape, or assault to kill is committed more frequently than once every twelve seconds. Are we also thankful that without fear of contradiction we can say: "Our country leads the world in crime?"

Yet, Gentlemen, these are the facts in this country of ours. So you can see that there is reason for those of us who are acquainted with the facts, those of us who have a part in the problem of law enforcement, to be concerned with what we believe will greatly increase the difficulty of coping with crime, and seriously decrease the efficiency of our already overburdened police departments.

At the outset I wish to emphasize that in no way is anything I may say to be construed as criticism of our Courts, and, more particularly, the Supreme Court of California. Our Supreme Court today has some of the ablest jurists ever to occupy that high post.

But it is my deep and abiding conviction that every lawyer--and particularly one in public service--owes a duty to his profession and to society to express his views when he conscientiously feels that the Court, in reversing a long line of cases, has adversely affected the public welfare by unnecessarily hampering the police in the performance of their duties, without a corresponding benefit to the individual members of society.

That is what we believe has occurred in the Cahan case.

To disagree with a majority--or even a unanimous--decision

of the Supreme Court in no way indicates a lack of respect for the Court. It merely means a disagreement with the Court's action in that particular case. After all, as we shall learn, the Court frequently has disagreements within itself.

Further, those who a few months ago urged the adoption of the exclusionary rule were disagreeing with and criticizing an unbroken line of decisions of the Supreme Court dating from California's earliest history. If for many years they could argue against the non-exclusionary rule, I can argue against this decision.

Let's get one thing straight right now. Contrary to some insinuations, no responsible public official advocates lawlessness on the part of police, regardless of the seriousness of the crime problem.

Our basic contention is not that police should be permitted to make unreasonable searches and seizures--illegal actions by police officers should not be tolerated.

Our views on this point were made very clear in the petition for rehearing filed in the Supreme Court. Chief Parker has frequently expressed the same view, and long ago implemented it with rules which require officers to obey the law in every respect.

Therefore, the issue is not whether police should violate constitutional rights, but rather what will be the effect if an action taken by them should afterwards be held to be illegal. Shall society be punished, the truth suppressed, and criminals freed, because of the error of a policeman?

Certainly the officer should be held accountable if he wilfully violates constitutional rights. But do not free the criminal.

With these general statements of principle, may I now discuss the aspects of the Cahan case about which we are deeply concerned.

First, the necessarily implied holding that the entries and the seizures of evidence in the Cahan case were unreasonable; and, second, the adoption of the exclusionary rule. That rule holds that when an officer, even one acting in good faith and in reliance upon statutory provisions and previously decided cases, makes a search or seizure thereafter held to be unreasonable, the criminal is freed and, in effect, granted complete immunity from prosecution for his crime because the evidence necessary for his conviction can never be used against him.

You have heard something about this case of the Los Angeles bookmaker, Charles Cahan, before the Supreme Court of California, but you have not heard the full facts, for the very good reason that the Court did not have the real detailed facts in the record before it when it wrote its opinion. This is so because the question of how the evidence was obtained was not in issue before the trial Court, as the exclusionary rule was not then in effect.

Cahan was not a penny-ante bookie. He personally took no bets. He had a staff of employees, runners and sidewalk bookies working for him and he was the biggest bookie in our history. Cahan handled millions of dollars a year, and his net profits were hundreds of thousands of dollars annually. The police were attempting to break up a big operation, which had in it all of the well known possibilities for racketeering, strong-arm collections (of which we have seen a recent example), and murder.

The police were seeking the "big fellow," the man behind the scenes. How many times have you heard it asked, "Why don't the police go after the real criminal instead of the little penny-ante stooges?"

After his trial, Cahan was convicted, upon completely convincing evidence, and his conviction was affirmed by the California District Court of Appeal.

But, the California Supreme Court granted a hearing and reversed the conviction, on the assumption that the evidence against Cahan had been illegally obtained.

Yet this conviction was possible only by obtaining evidence in the manner condemned by the Supreme Court.

Now another important fact to know when judging the action of our police department in the Cahan case:

Pursuant to our democratic processes, and in accord with our basic concept of separation of powers between the legislative, the judicial and the executive, the Legislature had enacted section 653(h) of the Penal Code to restrict the snooper. It makes the installation or use of dictographs unlawful, but it specifically says that it does not prevent the use of dictographs by a policeman expressly authorized by the Chief of Police when that use is necessary in the performance of his duty in detecting crime and apprehending criminals.

Chief Parker, after being presented with evidence which convinced him of the need for the installation, and believing such action legal, in reliance upon such section, authorized the dictaphone installations, none of which was made in Cahan's home or in any other building where he had any legitimate interest.

Later, and after the police had positive evidence of the criminal conspiracy and that felonies were then and there being committed, they forced entries and made sixteen arrests.

These, briefly, are the facts in the Cahan case.

The Berger case, reversed simultaneously with the Cahan case, involves different facts. It is interesting for two reasons: First, it is not a bookmaking case, for which some people have little sympathy, although of course a police department may not decide what felonies it will enforce. It was a charity racket in which donations were fraudulently secured, ostensibly to aid a blood bank. Second, in the Berger case the officers went to the district attorney and with him to Court and obtained a search warrant under which they seized the evidence in question.

Only later was it held that the search warrant was improperly issued.

While in the Cahan case there was no warrant, in our considered opinion, based on prior cases, none was required. The persons arrested were engaged in felonious acts at the time, and the officers had reasonable cause to believe such to be the fact. There was material evidence in the possession of the persons arrested which would have been destroyed had the arrests and seizures not been made by surprise, and the officers had reasonable cause to believe that such destruction would be the result of a formal prior demand for admittance.

After all, evidence of bookmaking, as of dope peddling, can be destroyed as quickly as a toilet can be flushed.

When the Supreme Court reversed the Cahan case we made a careful analysis of the federal cases construing the exclusionary rule, and of cases involving searches and seizures. It was our conclusion that under the true facts the searches and seizures in the Cahan case were legal. Likewise, we concluded that other legal points had not been fully considered by the Court.

Because of this, and the importance of the case, we felt it was our duty to present the true facts, and our views as to the applicable law, to the Supreme Court.

Obviously, there is not time here fully to review the propositions urged upon the Court in that brief, but I should like to mention a few of them.

Our first point was based on Section 4-1/2 of Article VI - a specific constitutional provision limiting the power of the Supreme Court to reverse cases where there is no miscarriage of justice.

Bear in mind that this is a constitutional provision of the highest dignity, adopted by the people from whom the Courts derive their authority.

The Supreme Court did not find that there had been any miscarriage of justice in either the Cahan case or the Berger case. Everyone concedes that both Cahan and Berger were guilty. Why then was it proper for the Supreme Court to disregard this salutary constitutional provision? If adhered to, it would have prevented a reversal, even assuming it was error to admit the disputed evidence.

A second point in our brief was that the Court's decisions violated the provision in Article III of the California Constitution that no person charged with the exercise of judicial power shall exercise any legislative function.

The majority opinions in the Cahan and Berger cases make it clear that the Court, because the Legislature had not done so, adopted a rule of evidence which the Court thought proper. Yet in California rules of evidence are properly established by the Legislature. The function of the Courts is to interpret the statutes containing such rules, not to make new rules to their liking.

Yet here the Court usurped the functions of the Legislature and itself made the rule, because, as the Court stated:

> "The constitutional provisions themselves do not expressly answer the question whether evidence obtained in violation thereof is admissible in criminal cases. Neither Congress nor the Legislature has given an answer."

Obviously, if it is a matter about which Congress or the Legislature could give the answer, then it is a legislative matter. It is a dangerous precedent for the Supreme Court by judicial fiat to make legislation which it thinks advisable, although the Legislature has not seen fit to enact such legislation.

And listen to this statement by the Supreme Court:

> "The exclusionary rule is not an 'essential element' of the right of privacy guaranteed by the Fourth Amendment, but simply a means of <u>enforcing</u> that right . . ."

Undoubtedly the majority of people are of the opinion that "enforcement" is the function of the executive.

It is no answer to say that the Court was in favor of the legislative rule it adopted, and that it was dissatisfied with the "enforcement" of existing law. The principle of the separation of powers is the most fundamental in our constitutional structure. Our government is one of checks and balances.

That you may be in favor of the results accomplished by this particular usurpation of power is immaterial. The danger of the precedent is just as great.

We have heard that this exercise of legislative powers by the Court, to fill a vacuum left by the Legislature's failure to act, was necessary to prevent California's becoming a police state. I submit that a police state is one in which a small group has gathered into

its own hands all of the executive, the legislative and the judicial power. And I submit to you that a police state is not set up by police officers. The danger of a police state in this country, if there is a danger, lies more in making police officers powerless to prevent the seizure of all power--executive, legislative and judicial--by the type of criminally-minded men who have erected police states in other parts of the world.

A third point which we urged is that the Cahan and Berger decisions will create a chaos of uncertainty and confusion in law enforcement.

The Supreme Court certainly had no intention or desire to create what is now called the "Cahan chaos". In fact, in the view of the four Justices who constituted the majority, it was opening "the door to the development of workable rules governing searches and seizures and the issuance of warrants".

But how is confusion to be avoided while the "workable rules" are being developed?

The three Justices who dissented had this to say:

> "The majority does not suggest what these 'workable rules' may be, nor how 'confusion' may be avoided. Neither the federal courts nor the few states which adopted the exclusionary rule have apparently found a satisfactory solution to this problem of developing 'workable rules' and it seems impossible to contemplate the possibility that this court can develop a satisfactory solution. At best, this court would have to work out such rules in piecemeal fashion as each case might come before it. In the meantime, what rules are to guide our trial courts in the handling of their problems?"

And I might add, "What shall I tell our Police Department? How can I properly advise our officers so that they can conduct themselves in accordance with rules not yet developed?"

We cannot rely on the federal rule, changeable as are the decisions under it, as the California Supreme Court stated it was not bound by and need not follow those decisions.

Indeed, the California rule apparently goes far beyond the federal rule, as the federal rule would not have freed Cahan.

In the dissenting opinion it is further stated:

> "..... this Court, by the sweeping repudiation of its past decisions, launches the administration of justice upon an uncharted course which the trial courts will find great difficulty in following."

The correctness of this prophecy is shown by a preliminary survey of trial court decisions. It is apparent that many startling courses are being set.

For example: A reliable informant took a police officer to a certain address and stated, "They are peddling narcotics like they have a license, and I scored for 2 cans." The officer knocked. The door was partially opened by a man who attempted to slam it when the officer identified himself. The officer made a forced entry and seized a supply of marijuana. The defendant freely confessed possession and sales. The trial court dismissed the case.

In another case, two officers investigating narcotics accosted a suspect in the hallway of an apartment house. The suspect popped an object in his mouth, and ran. A struggle ensued, the officers held the suspect's jaws, and removed a package containing

36 capsules of heroin. The suspect pleaded guilty to a narcotics charge but his plea was set aside and the case was dismissed.

Incidentally, had the officer permitted the defendant to swallow the heroin it would have been a fatal dose, so by saving the dope peddler's life the officer violated his constitutional rights.

In yet another case, an officer, pursuant to certain information, went to an address. A person on the front porch stated that he had just bought marijuana from a man inside the house. The officer, while knocking on the door, observed a man running into the kitchen. The officer forced entry and arrested the man. One hundred and five grams of marijuana were recovered from a closet in the kitchen. This man confessed being a dope peddler. The trial court found him not guilty upon the basis of the Cahan decision.

Here, as in all cases where the trial ends in finding the defendant not guilty, the Supreme Court will never have an opportunity to formulate the "workable rules" forecast by the majority, because the prosecution cannot appeal a "not guilty" decision.

Another case was dismissed because the officers did not knock and announce who they were before making an entry to a place where a felony was in process of being committed.

In yet another case a defendant had entered a guilty plea prior to the Cahan decision. After the Cahan decision, when appearing for sentence, the defendant was permitted to withdraw the plea of guilty, enter a plea of not guilty, and the case was then dismissed.

In still another case, an informant gave officers his code name and the phone number of a bookmaker with whom the informant had placed bets. The officers then consulted with the district attorney's office as to how they could legally effect the arrest of the bookmaker. In accordance with the advice received, one officer stationed himself near the entrance. His brother officer phoned in a bet from a vantage point where he had the premises under observation. As he was phoning the bet, the officer signaled his partner, who identified himself, announced his purpose, and entered. The sole occupant was apprehended in the act of destroying bookmaking paraphernalia. The trial court dismissed the case, stating no forced entry was legal without a search warrant.

Seemingly, some courts assume that the Cahan case holds that no entry is legal unless made with permission, or pursuant to a search warrant. Assuming this to be correct, let us consider its impact upon police work.

A police officer walked towards a young man on the sidewalk. Without warning, this man drew a gun and shot the officer to death. Other officers started a systematic search to find the killer. Some questioned householders, others searched back yards, garages and outbuildings. No officer stopped to ask permission. No search warrant could have been obtained because the killer could not have been identified nor could the property to be searched have been designated. The killer was found hiding behind a doghouse on private premises.

Here a desperate killer was quickly apprehended--but numerous entries on private property were made without permission. Should

we hereafter order our police not to conduct such an immediate search?

Calls reporting prowlers are received dozens of times every day. The neighborhood is searched and frequently a wanted criminal is caught or a crime is prevented. Should this practice be stopped unless the prowler is found on the premises of the person putting in the complaint, which rarely occurs?

Calls that a neighbor has not been seen or heard from for some time are frequent. In investigating, a forced entry is sometimes made. Under these circumstances it is obvious that no search warrant could be obtained. Yet murders, suicides and other deaths have been discovered in this manner. Shall we now wait until stench of the dead body becomes a nuisance which can be abated?

If so, what will happen where there is a person helplessly sick, or unconscious?

You say this is different: that such an entry is proper. Our friends who rejoice in the Cahan decision, if consistent, would disagree. If a forced entry cannot be made when a felony is in progress, where is the authority to enter to satisfy a neighbor's curiosity?

Consider one more case. A telephone call was received from the mother of a prominent actress. She stated that she had just talked with her daughter and had concluded that her daughter was committing suicide.

There was no time to verify if the caller was in fact the mother. In any event, she could not legally have given permission to enter her daughter's home.

Officers rushed to the address given. They knocked but received no answer. An entry was forced. They found the unconscious form of the actress. She was rushed to the receiving hospital. There, still unconscious, her stomach was pumped.

Her life was saved. Newspapers headlined the case. Many considered it a fine example of prompt police work.

But wait -- under the construction being placed on the Cahan case, we find that our officers were heinous criminals. No crime was being committed by the actress or anyone else. But a forced entry was made without permission in a private home -- the sleeping quarters of a beautiful woman were invaded. She was carried bodily from her own home and subjected to the indignity of having her stomach pumped. Yet the United States Supreme Court excoriated deputy sheriffs for pumping the stomach of a dope peddler who while under arrest swallowed dope to destroy evidence--in itself an illegal act--and freed the peddler.

So under the latest decisions, we find that our officers may have committed at least the following crimes:

Burglary (Irvine case)
Forcible entry
Kidnapping
False imprisonment
Battery
Speeding

Rather an imposing list of crimes--and what about the doctor? Well, he is probably guilty only of false imprisonment, assault and battery.

So we see that the most disturbing aspect of the Cahan decision is that it is interpreted to prohibit police work which is necessary if we are to have effective law enforcement.

At the least, it adds further confusion and uncertainty in the field of arrest, search and seizure.

If police officers are to act effectively and aggressively in preventing crime and apprehending criminals, they must know with reasonable certainty as to what should be done, and what should not be done, in the performance of their duties. To tell them this will be decided upon an ex post facto basis is small help and no comfort, in view of the astounding fluctuation and division in court decisions.

Reference to search and seizure cases of the United States Supreme Court reveals a striking situation:

For example:

Olmstead v. U.S. (1928)	5 to 4, each dissenter announcing his reasons in 4 separate dissents.
Goldstein v. U.S. (1942)	5 to 3, one not participating
Goldman v. U.S. (1942)	5 to 3, one not participating. The dissenters announcing their reasons in 2 separate opinions.
Wolf v. Colorado (1949)	6 to 3, one of the majority stating his reasons in a separate opinion; the dissenters announcing their reasons in 3 separate opinions.
Brinegar v. U. S. (1949)	6 to 3, one of the majority stating his reasons in a separate opinion.

Stefanneli v. Minard (1951)	7 to 2; two of the majority concurred in an opinion based on reasoning separate from the majority
On Lee v. U. S. (1952)	5 to 4; each dissenter gave his separate reasons in a separate opinion, and, as if that were not enough, one dissenter also concurred with one other dissenter.
Irvine v. California (1954)	5 to 4; one of the majority gave his reasons in a separate opinion; the dissenters could not agree either and split upon their reasoning into two separate opinions. This decision is more properly characterized as a 4-1-2-2-decision, than a 5-4 decision.

Consider the Trupiano case. A federal agent, present with the consent of the property owner, noticed the odor of fermenting mash coming from a building. On moving closer he saw an illicit still in operation. He entered, placed the defendant under arrest and seized the still. In a 5 to 4 decision the court held that the evidence obtained should have been suspressed because there was no search warrant.

The enduring certainty of the law there announced guided our law enforcement officials for the lengthy period of some twenty months when the court in the Rabinowitz case, by a 5 to 3 decision, expressly overruled the Trupiano case.

When the highest court in the land tells the law enforcement officer now its 5 to 4 this way and now its 5 to 4 that way, is there any wonder that the policeman is perplexed? Should he be unwise enough to make a decision that a particular seizure would be illegal, whereas only 4 of the 9 Supreme Court Justices would have later concurred with him, he has failed to perform his statutory and sworn duty of apprehending criminals and preventing crime. He may thereby be subject to both criminal prosecution and disciplinary action for failure to do his duty.

But on the other hand, if he should decide to make a seizure, and only 4 of the Justices should later agree that it was a reasonable seizure, and the other 5 should hold it unreasonable, then the officer is viciously attacked, maligned and castigated for his hobnail boot technique, and likewise may be subject to both criminal prosecution and disciplinary action. All this because he missed by one the number of Supreme Court Justices who would agree with his spur-of-the-moment judgment.

But add to this confusion the exclusionary rule and we have confusion worse confounded. For now the public is vitally affected.

Suppose the officer makes a search or seizure which is later held to be unreasonable - why the dumb cop, with hobnail boot technique, whose judgment is so bad that only 4 of the nine members of the Supreme Court agree with him, has by his unreasonable search forever granted to the criminal immunity from prosecution for his crime.

Of course, if the officer is one of our smarter officers whose judgment will be backed by 5 of the 9 Justices, then everything is all right.

But when the Supreme Court reverses itself, and a majority view of yesterday, holding a search reasonable when made, becomes the minority view before the case reaches the court, it is a little difficult for even our smartest officers.

To me it seems preposterous that our administration of criminal justice is so uncertain and confused, and that a criminal may be turned loose, forever freed from prosecution for his crime, because a police officer in good faith made a search or seizure held to be reasonable by 4 Justices of the Supreme Court, whereas 5 held it to be unreasonable.

That is our objection to the exclusionary rule.

We strongly feel that the problem created by the uncertainty of what is a reasonable search or seizure should not be permitted to destroy the effectiveness of our police force, nor the expeditious handling of criminal cases, as is the result of the exclusionary rule.

We have heard that some states have adopted the exclusionary rule. What has been their experience?

In a recent issue of the Journal of Criminal Law, Criminology and Police Science, published by the Northwestern University School of Law, there appeared an article reviewing the experience in Illinois, under the exclusionary rule. First of all, as to the effectiveness of the rule in accomplishing the only justification for its existence--that of stopping illegal searches and seizures--it is stated.

> "A study of the records of Branch 27 of the Chicago Municipal Court--popularly known as the 'Racket Court' -- for the year 1950 indicates that the rule has failed to deter any substantial number of illegal searches. In 4,673 out of 6,649 cases the legality of the method of

obtaining evidence was put in issue by the defendant. In 4,593 of these cases the court determined that the search had in fact been illegal and granted the motion to suppress the evidence. No cases were found in which a conviction was secured despite the suppression of the evidence."

In other words, in 69.1% of the cases a motion to suppress the evidence was made. In 98.3% of these cases the motion to suppress was granted. In cases where a motion to suppress was made, it was granted in 90.8% of concealed weapon cases and in 100% of narcotic cases!

The article further stated:

"From observations made in the Court, it is obvious that the police are aware of the requirements of the rule. Indeed, in gambling cases, their testimony seems calculated to insure the exclusion of the seized evidence ... "

and, further:

"While corruption may be a factor in the type of testimony given by the officer, or in inducing him to make an illegal raid, rather than a legal one, when the 'heat is on', it is difficult to prove. It should be noted that a police officer may immunize a criminal from prosecution by an illegal search, since evidence illegally seized may never be used. If the evidence illegally seized is the only evidence, the criminal must go free."

So it may be reasonably concluded that the exclusionary rule has been used in Chicago as a means of intentionally granting immunity to criminals. In any event, it has accomplished no purpose beneficial to society.

And what about the neighboring state of Michigan.

Don S. Leonard, former commissioner of the Michigan State Police and former commissioner of the Detroit Police Department, discussing the effect of the exclusionary rule in Michigan, recently stated:

> "The exclusionary rule has been in effect since the adoption of the State Constitution. Under that rule many notorious gangsters and gunmen were freed from charges of carrying concealed weapons. The People of Michigan became incensed, feeling that constitutional guarantees were to protect good citizens, and not to cloak dangerous criminals with immunity. The result was that in 1934, the People adopted a constitutional amendment which deprived gunmen of such protection by providing that pistols and weapons seized outside the curtilage of a dwelling would be admissible in evidence.
>
> "Two years ago the People of Michigan, alarmed at the increase in narcotics traffic, passed a similar amendment to the Constitution as applied to the seizure of narcotics.
>
> "These two constitutional amendments provided by an incensed public have increased the ability of the People of Michigan to cope with the criminal army."

The police have been criticized because they did certain things without search warrants. It is a very strong argument in the mind of the uninformed--particularly when the search warrant procedure is contrasted to the hobnailed boot.

The trouble with the whole argument is that it assumes that a search warrant could have been obtained, when it could not have been, and it assumes that the police arbitrarily barged into a place, when in fact they did not.

Now, why couldn't a search warrant have been obtained?

Because our Penal Code states that "a search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." The man making the affidavit must be able to describe certain property at a particular place from his own knowledge. He must <u>know</u> the property is there.

That is not the only limitation on search warrants. There is no authority for a search warrant to get property which is only evidence of a crime, and numerous courts have held invalid search warrants which described only evidentiary material.

One final point should be noted. We have heard of Communist brain-washing, of the torture chamber, and forced confessions. That these would be mentioned as support for the exclusionary rule illustrates how little understood is the true effect of the exclusionary rule. Comparison has been made between the exclusionary rule and certain constitutional guarantees, such as the right to counsel, the right to a public and speedy trial, the right to refuse to give incriminating testimony.

All these constitutional guarantees are for the purpose of

assuring that the real truth will be ascertained. We all know that there is no assurance of the truth of a forced confession. Likewise public trials and right to counsel are for the purpose of ascertaining the truth--not for the purpose of suppressing the truth.

But at the other extreme the exclusionary rule is made operative by a motion to suppress! And what is suppressed? Physical evidence, documentary evidence, evidence that is the absolute truth!

The exclusionary rule is in direct conflict with all our other procedures--with all our constitutional safeguards which are designed to assist in the ascertainment of the truth. Even the most avid defender of the exclusionary rule could not be so deluded, or dishonest, as to even suggest that such rule is for the purpose of discovering and proving the truth. On the contrary, it is used only by those who would be destroyed by the truth.

America and Americans need a reawakening. It is not the criminal who needs protection from the police. It is the law-abiding citizen who needs protection from the criminal.

We must rid ourselves of the fantasy that the police and the citizenry are somehow opposed to each other. All too often in this field we find the problems cast in the form of a war between the police and society rather than the true situation of a struggle between society and the criminal. We must cast off the childish delusion that the problems of modern-day law enforcement are but another form of the game of "cops and robbers". Let us face up to the fact that crime is, indeed, a "dirty business", but it is our business. We should be thankful that the police are willing to do the job of fighting it for us.

When they lose a battle, it is our battle. If they lose a war, it is our war. The enemy is none the less real because he operates singly, or in small groups, nor is the danger less great because he operates under cover.

The problem is to define the authority of law enforcement officials in terms adequate to their task, without enlarging such power in derogation of legitimate individual liberties. That problem needs the application of realism as well as idealism for its solution.

Ex. #1 IV

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
JOHN F. AISO, JUDGE

January 10, 1956.

The Hon. A. Allen Smith,
Chairman, Assembly Judiciary Committee,
530 W. 6th Street,
Los Angeles 14, California.

Dear Sir:

Thank you for your kind courtesy in inviting me to appear before your Committee hearing concerning illegal searches and seizures and laws of arrest as affected by the exclusion decision of the Cahan case, with special reference to enforcement of the law against narcotic offenses.

Following receipt of your invitation, I have done some reading on the subject matter and discussed the problems that we judges face in relation to it, with some of my colleagues with greater personal experience in the criminal law and criminal procedure field. It is our conclusion, after giving the matter some thought, that the problem which faces your committee is more that affecting law enforcement officers than the judge called upon to apply the rule of the Cahan case to the case before him. In that phase of the question we defer to the experts in the law enforcement field and in view of the galaxy of experts scheduled to appear before your committee, we could add very little from our experience. As for the legal arguments pro and con, they appear in the decisions of the Supreme Court themselves.

It is true that the "about face" exec uted by the Supreme Court in the Cahan case did give us a sense of confusion with reference to the admissibility of evidence in the cases filed prior to the anouncement of that rule. It is natural to presume, however, that since that rule has been announced very few cases flying into the face of that ruling will now be filed and come before us.

So far as we as trial court judges are concerned, we look to the appellate courts for rules of evidence to be applied as well as to the statutes. With reference to the particular problem at hand, the Supreme Court does seem to be working out the refinements of its ruling. See for instance: People v. Tarantino, 45 A.C. 617; People v. Brown, 45 A.C. 666; People v. Simon, 45 A.C. 671; People v. Boyles, 45 A.C. 677; People v. Michael, 45 A.C. 776; People v. Martin, 45 A.C. 780; and People v. Gorg, 45 A.C. 800, to date.

It may well be that if the Supreme Court continues to hand down decisions which will serve as our guide posts that these will be adequate to meet the problem at the trial court level.

But there may be repercussions at the enforcement and arresting level of which we may not be aware. But as stated, before we leave this area for the law enforcement authorities to bring to your attention.

That fact that the decision has given new impetus for a re-examination of the laws pertaining to searches, seizures, and arrests in the light of modern day conditions, by the legislature, courts, law enforcement agencies, and legal scholars is something which I think will be of benefit for "ordered freedom" in the long run.

I feel honored to have been invited, but as both my legal practice and experience on the bench has not been as extensive on the criminal side as it might be, I feel that other than what I have set forth above, there is very little that I can contribute to the most important work of your committee.

Respectfully yours,

John F. Aiso.

Ex ~~A~~ V

Proposed new sections for Government Code:

§ 50150. A local agency is responsible for any false arrest, false imprisonment, or illegal search or seizure committed by any of its officers or employees during the course of his service or employment.

§ 50151. Any person who has been falsely arrested, or falsely imprisoned, or whose person or premises have been illegally searched by any officer or employee of any local agency acting during the course of his service or employment may bring an action against the local agency employing such officer or employee and may recover his actual damages and [$500] [$750] [$1,000] in addition thereto.

§ 50152. Such actions shall be tried in the county where the arrest, imprisonment, or search occurred and shall be commenced within six months after the commission of the act complained of. No claim need be filed with the local agency prior to bringing suit.

[Cf. Gov. Code §§ 50140-50142. Local agency is defined in Gov. C. section 50001 to mean county, city, or city and county.]

Exhibit
in Transcript

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
VERNON W. HUNT, JUDGE

January 6, 1956

Hon. H. Allen Smith
Member of Assembly, Forty-Third District
400 Security Title Insurance Building
530 West Sixth Street
Los Angeles 14, California

Dear Mr. Smith:

I find that we have such a heavy calendar in the felony preliminary court in which I am now presiding that it will be impossible for me to leave the court for the purpose of attending the hearings on January 11 and 12, but it occurs to me that your purposes might be just as well served if I would set forth in writing my analysis of the problem which the committee is to consider.

By its decision in the Cahan case, the Supreme Court of this state has taken the "hint" of the United States Supreme Court in the case of Irvine v. California (347 U.S. 128) and has not only "reconsidered" the "evidentiary rules" of our state courts but has expressly overruled all previous cases on the subject and has now laid down a new rule of evidence which is designed by our Supreme Court to enforce the right of privacy guaranteed by the Fourth Amendment. The Supreme Court expressly and emphatically states that "the contention that unreasonable searches and seizures are justified by the necessity of bringing criminals to justice cannot be accepted" and that such a contention "is not properly directed at the exclusionary rule, but at the constitutional provisions themselves." (People v. Cahan, 44 Cal. 2d 434, at pages 438 and 449.) Therefore, the Supreme Court has spoken, and the matter is settled, unless the voters at some time in the future see fit to change the rule by amending our State Constitution accordingly. It is possible that even such an amendment would not operate to change the rule, because the Fourth and Fourteenth Amendments to the United States Constitution would still be in existence, and the United States Supreme Court has indicated rather strongly that if the states do not take suitable steps to deter officers from making unreasonable searches and seizures, that court may take steps to enforce the guarantees of the Fourth Amendment against the states through the Due Process Clause of the Fourteenth Amendment. (Irvine v. California, 347 U.S. 128; Wolf v. Colorado, 338 U.S. 25.)

In the closing paragraph of its opinion in the Cahan case, the Supreme Court stated that the adoption of this new exclusionary rule "opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime." Such rules are now being developed by the Supreme Court and the District Courts of Appeal, and I believe that this method of solving the problem is preferable to an attempt to solve it by legislation or by an attempt to amend the State Constitution, for the reasons above stated.

Trusting that this analysis of the matter may be of some value to the committee, and assuring you that if the committee especially desires my personal appearance at any of the hearings I shall be glad to co-operate, I remain

(Yours)

Respectfully yours,

Vernon W. Hunt

VWH/cp

Ex III

SUPERIOR COURT
MILTON D. SAPIRO, JUDGE
SAN FRANCISCO
CALIFORNIA

December 29, 1955

Honorable H. Allen Smith,
Chairman, Assembly Judiciary Committee,
400 Security Title Insurance Bldg.,
530 West Sixth Street,
Los Angeles 14, California.

Dear Mr. Smith:

I am sorry that I will be unable to attend the hearing of your committee to be held on January 11th and 12th.

I do believe that remedial legislation should be introduced to offset the recent decisions of the Supreme Court that have so handicapped the securing of evidence in reference to persons who are committing crimes.

I do not think the police department should be confined to horse and buggy methods in an electronic age. There must be some way of permitting them to use modern devices without the invasion of a person's constitutional rights. No one has a constitutional right to commit a crime and law enforcement officials should have the opportunity of using modern means of detection and the law should grant such rights to them.

Sincerely,

MDS:hll

From Pete Pitchess

Statement of Sheriff E. W. Biscailuz before "HEARING OF THE ASSEMBLY JUDICIARY SUBCOMMITTEE ON ILLEGAL SEARCHES, SEIZURES, AND THE LAWS OF ARREST".

Hon. H. Allen Smith, Chairman

DATE: January 12, 1956

TIME: 10:30 A.M.

PLACE: Main Auditorium, L.A.P.D., Administration Building

This Assembly Judiciary Subcommittee is performing a great public service in conducting an inquiry into the matter of illegal searches, seizures and the laws of arrest. The facts secured by this body will be of great material assistance in its deliberations and recommendations in Sacramento. I am sure that this Subcommittee will be better prepared to meet its responsibility of protecting both the rights guaranteed by constitutional provisions, as well as the vital interest of the people in effectively suppressing crime.

Following the application of the exclusionary rule by the California Supreme Court, I issued the following directive to the Sheriff's personnel:

> Quote -- Attention is hereby called to recent rulings of the Supreme Court of California in the cases of People vs. Charles H. Cahan and People vs. Alfred Berger, wherein evidence introduced by police officers was found to have been unlawfully secured. Copies of these rulings, together with copies of dissenting

opinions, are being supplied to all commanding officers and unit heads. All employees of this Department are admonished to note and heed the import of these decisions, especially so as they apply to normal conduct of employee's duties. Every effort will be made by operating personnel to adhere closely to a policy of securing evidence only through proper and lawful methods, and with due regard for all pertinent decisions of the United States Supreme Court, the California Supreme Court, and Federal and State statutes - Unquote.

Following the Cahan decision, we experienced a period of uncertainty throughout the department while we analyzed the implications in this case. First, we recognized that it was reflected in matters relating to preliminary investigations of suspicious persons and cars by the patrolling radio car deputies.

Secondly, a decrease of activity was more readily observed in arrests of illegal bookmakers and persons unlawfully in the possession of narcotic drugs.

We held conferences with our staff officers and line unit commanders wherein we attempted to develop positive courses of action which would enable us to carry on with our work.

Some 30 days after the Cahan decision, there was an upswing - in the direction of normalcy - of arrests in illegal bookmaking and narcotic possession cases. However, there have

been numerous instances - especially in narcotic possession cases - where narcotic officers, because of the uncertainty in establishing probable cause or lacking specific and detailed information, sincerely believed they were not in a tenable position to make an arrest. Unfortunately, until the matter at hand is clarified, such a condition will continue to affect the officer.

The general rule that a reasonable search may follow a lawful arrest is now lent emphasis under the exclusionary rule. The laws pertaining to arrest, search and seizure were enacted in 1872, with pertinent statutes not having been materially altered since then.

Now, more than ever, it becomes necessary to carefully review and compare the case law pertaining to arrest, search and seizure in order to fulfill our obligations as peace officers. At the same time, it would be wholly unrealistic to expect the officer in the field to make split-second decisions on the premise that he have at his fingertips the many court decisions that materially affect such matters as arrest, search and seizure.

We well recognize that conditions have changed, in fact many words have changed in meaning and in their everyday use. Science and technology have dramatically altered and changed our very culture and way of life.

Accordingly, the peace officer must be properly informed in order to continue to protect constitutional guarantees, and to effectively keep pace with modern requirements of law enforcement.

He therefore has need to be provided with rules relating to arrest, search, and seizure, along constitutional lines, that are certain, simple, and adequate.

Relative to the waiver of the exclusionary rule, so far as it applies to narcotics, I am favorably inclined. Yet consideration should also be given to its application in such major crimes as murder, kidnapping and extortion.

As to specific recommendations, may I make this statement:

There are numerous sections of the Penal Code, which apply to arrests, search, and seizure. A comprehensive study should be made to simplify and modernize these laws. Inasmuch as law enforcement officers, prosecutors, and members of the judiciary are vitally concerned in the administration of criminal justice, I urgently recommend, that such a deliberate and comprehensive study, be the combined efforts of law enforcement officers, prosecutors and members of the judiciary.

#

January 9, 1956

To: C. E. PERKINS, City Manager

From: C. R. EGGERS, Chief of Police

SUBJECT: Monthly Report for Division of Police for month of December, 1955

Our Statistical Report for this month also includes some totals for the year. In most respects the yearly comparisons are very gratifying; however, some sobering trends did appear during the months of November and December:

	THIS MONTH	NOV 1954	THIS YEAR TO DATE	LAST YEAR TO DATE
Reports received Pages 1 & 2	1,284	1,076	12,595	12,966
Major Offenses Pages 3 to 5	240	156	2,017	2,049
Checks submitted Page 5	69	130	973	950
Prisoners Confined Page 8	157	151	1,752	1,725
Traffic Collisions Pages 9 - 11				
Personal Casualty	40	37	395	440
Property Damage	225	190	2,024	1,879
Traffic Arrests Page 9				
Moving	1,063	856	16,477	13,942
Non-moving	1,685	1,309	20,609	15,378
Juvenile Delinquency Cases handled Page 12	51	35	325	337

On the whole these figures speak for themselves, but some comments are in order. There is a slight decrease in the number of reports of all types received during the year; however, during the last two months business has picked up. There was a very small increase in this category during November and a much larger increase in December. This part of the report indicates the overall work-

load of the Department, and it must be remembered the time taken to investigate and report the instances enumerated here, take time away from any preventive patroling which must be done.

The same thing is true in the classification under the heading of "Major Offenses". Following is a complete breakdown of the offenses included in this classification:

OFFENSE:	THIS MONTH	SAME MO LAST YR	TOTAL THIS YR TO DATE	TOTAL LAST YR TO DATE
Murder	0	0	1	2
Manslaughter	0	0	2	2
Rape	0	0	2	0
Robbery	8	6	38	47
Aggravated Assault	0	0	11	10
Burglary	37	26	422	525
Larceny over $50	22	16	242	217
Larceny under $50	143	105	1,155	1,075
Auto Theft	30	3	144	171
Total	240	156	2,017	2,049

This breakdown shows 47 robberies committed in Glendale in 1954, 38 committed in 1955, a decrease of a little better than 19%.

In 1954 there were 525 burglaries committed with only 422 in 1955, a decrease of 19.6%; however, in November of 1955 there were 42 burglaries committed against 16 in November 1954, and 37 committed in December of 1955 against 26 in December, 1954. This is one of those sobering trends I mentioned earlier in the report.

Traffic collisions were made a subject of a special report on January 3rd, 1956. This report contained all of the information on this subject up until this time.

We show a very healthy increase in number of arrests made for traffic violations, both moving and non-moving. I do not believe that we have yet reached the saturation point in this field but we are fast approaching it, especially in the moving violations.

Our Juvenile Delinquency picture is somewhat better than a year ago with a decrease of 6% in the cases handled over the entire year; on the other hand our figures again show an increase in the months of November and December over the same months of last year. Another interesting factor in this classification is that 27% of the cases handled during the year were non-resident children. During the month of December, 17.6% of the ones handled were non-resident.

This report is not intended to take the place of the full annual report which will be forthcoming in several weeks.

Chief of Police

CRE/rcl.

$$
\begin{array}{r}
0.297 \\
37\overline{)11.000} \\
\underline{74} \\
360 \\
\underline{333} \\
270 \\
\underline{259} \\
11
\end{array}
$$

In Transcript

PRESENTATION BY ROGER ARNEBERGH,
CITY ATTORNEY, CITY OF LOS ANGELES,
AT HEARING OF ASSEMBLY JUDICIARY
SUBCOMMITTEE ON ILLEGAL SEARCHES,
SEIZURES AND THE LAWS OF ARREST,
HELD IN LOS ANGELES, CALIFORNIA,
JANUARY 11-12, 1956

Mr. Chairman and Members of the Committee:

My name is Roger Arnebergh. I am the City Attorney of the City of Los Angeles. I have prepared a short statement which I would like to read and then present to the Committee. If, after I have concluded, any member of the Committee should wish to ask questions, I will be pleased to answer them.

In my capacity as City Attorney, I have a great personal and professional interest in the subject of your investigation. As a citizen, I am interested because the security of citizens is involved. As a lawyer, I am interested because the administration of justice is involved. As the public official who is charged with the prosecution of all misdemeanors committed within the City, and who has the responsibility of being the legal adviser to the Los Angeles Police Department, I have a very special interest and the advantage of a greater opportunity for knowledge of all the aspects of the problem here presented than do most citizens and most lawyers. In making this statement to you today, I have carefully weighed the problem from all these points of view, and I submit this to you for consideration.

You gentlemen are familiar with the nature and operation of the so-called "exclusionary rule" of evidence. I am sure that

you have read or heard comments which praise it as being the bulwark of society against a police state. In the mouths of some of its advocates it has already achieved equal standing with the rule that does not permit an extorted confession to be used; with the right to counsel, the right to a speedy and public trial, and the privilege against self-incrimination. But never yet have I heard one of these advocates carry their enthusiasm one step further and admit the effect of the exclusionary rule as compared to the effect of these other principles.

These precious legal principles of our heritage, history shows, have their roots in the desire of our ancestors to insure that the TRUTH will be known. Confessions obtained by force or undue duress were barred because there was no certainty that a confession made under such conditions was true. Prisoners subjected to either physical torture or"brain washing" can readily be induced to confess to crimes which they did not commit. Likewise, the right to counsel, the privilege against self-incrimination, even the rule that a wife cannot testify against her husband, have historical roots in the efforts by men for means of guaranteeing that the TRUTH will be known.

But now comes the exclusionary rule -- and this is the fact which I said advocates of the rule refuse to recognize -- for the first time in our history we have a rule of evidence which is designed to SUPPRESS THE TRUTH instead of reveal it. And when I speak of the truth which is suppressed, I mean physical evidence, the documents, the tools, the weapons, the narcotics, the counterfeit money, the evidence that, whether it proves guilt or innocence, can be felt, measured, tested. It is the best evidence,

the most reliable evidence, many times indispensable evidence the absence of which means that the known criminal must be set free, and yet such evidence is excluded, thereby suppressing the truth.

It is indeed a strange paradox that the so-called exclusionary rule, creating an entirely new policy for California courts in the administration of criminal law, should have its inception in the courts. Traditionally, and under our constitutional form of government with its separation of powers, it would appear to be more properly within the province of the Legislature to determine whether or not such policy should be adopted in California. Yet here we have the basic constitutional provision providing for a separation of powers infringed upon by the courts in their effort to prevent by this very indirect method alleged infringement upon other constitutional provisions.

To exempt known criminals from punishment as a means of keeping police from being over-zealous in their efforts to prevent crime and apprehend criminals is indeed a strange procedure and one fraught with grave dangers for society. It certainly is a policy which should have had the benefit of legislative debate and consideration before becoming the law of this state. It is my considered opinion that had the exclusionary rule been subjected to the scrutiny of the legislative procedure it would never have been adopted as the law in California. It would also strongly appear that unless the Legislature is willing to abdicate its legislative functions it will repeal, or at the very least modify the exclusionary rule as adopted by the courts. For if your study convinces the Legislature that the intangible and illusionary "benefits" of the exclusionary rule are outweighed by the very

tangible and clearly visible detriment suffered by society as a result of such rule, it is in the power of the Legislature to change the law!

While I am not now prepared to make specific recommendations for changes in the law at this time, I am a member of the Attorney General's Committee to study a revision of the law of arrest and the law of search and seizure in this state where these matters are receiving careful consideration. When the work of our Committee is completed, we hope to give you a draft of legislation that will be a substantial improvement over existing law, both by preserving the rights of individuals and by furthering the ability of 20th century society to protect itself from 20th century crime.

The great difficulty with our existing laws of arrest and search, as I see it, is the fact that they were drawn to fit a different age. The "hue and cry" and the Bow Street Runners may have been adequate for the 18th century; the California law of arrest may have been adequate for the 19th century; but in the field of protecting society from the criminals within it, there is no logic whatever to the phrase that what was good enough for our forefathers is good enough for us.

Take, for example, a 20th century crime that was committed partly here in Los Angeles, and ask yourselves if 19th century law enforcement methods are suited for its detection, let alone its prevention: A criminal alien who was deported to Europe sneaked back into this country by way of Canada. While in Canada he incurred the enmity of former associates in New York. He fled first to Detroit, then to Los Angeles. His enemies followed him.

When they located him, a gun was stolen from the New York waterfront; it was handed to another man at a New Jersey airport and flown to Los Angeles. One killer was already in Los Angeles, another was flown in from Seattle. The killers lay in wait, killed their former friend, fled in a car which had been stolen earlier that day especially for the getaway, transferred to another car, drove north and in a matter of hours they were several hundred miles away. That crime occurred in Los Angeles. When our law of arrest was written, Jules Verne was probably one of the few men alive who had the imagination to conceive of that kind of crime, and certainly they could not have been expected to draft a law of arrest that would give society the tools to prevent the occurrence of that kind of crime, or even to detect its perpetrators.

Now, I have said that I had no specific recommendations to bring you until the Attorney General's Committee has completed its work. I can tell you, however, that as far as I personally am concerned I intend to urge most strenuously that the Committee, at the very least, recommend modification of the exclusionary rule to the extent that it has been modified in Michigan -- that is, in the fields of narcotics and dangerous weapons.

As was proved in Michigan, in these fields the benefits to society resulting from such an amendment so vastly outweigh the purely speculative benefits of the exclusionary rule that, in my opinion, it is dangerous to do anything less. Narcotics and dangerous weapons violations are bad enough in themselves, but the greatest danger to society lies in the fact that narcotics and weapons are breeders of crime. While we cannot, and do not,

condone in principle the violation of constitutional rights by police officers, I see no reason why society should have turned loose upon it a known criminal carrying a gun, or a dope peddler caught with heroin on his person, merely because some court subsequently holds that the officer, exercising his best split-second judgment in the emergency with which he was confronted, acted differently than the court, in the quiet of its judicial chambers and after deliberating upon the matter for weeks or even months, decided the officer should have acted. And, remember, an officer must act immediately in many cases, for example, when apprehending a dope peddler. After all, evidence of dope peddling can be destroyed as quickly as a toilet can be flushed -- and in many cases it has been destroyed in that manner.

Narcotics and illegal carrying of weapons are the fields in which police work can be most effective in crime prevention. And though crime prevention is not spectacular and seldom makes headlines, it is my belief that long-range reduction in the crime rate will be due more to crime prevention than crime detection. It is more important to prevent the commission of a crime than to punish the perpetrator of the crime. All will agree that it is far better to prevent ten murders than it is to catch, convict and execute ten murderers. Yet our present laws, as now interpreted by the courts, greatly handicap the work of our police officers in their efforts to prevent crime, as well as hindering their efforts to apprehend criminals.

Narcotics, of course,are the most spectacular problem, and the most fruitful field for crime prevention. It has been reliably estimated that narcotics are involved in approximately

50% of all crimes that are committed. The crimes are committed under the influence of narcotics, or are committed in order to get money to buy narcotics. Every user is a potential pusher. Most users, sooner or later, resort to criminal activities in order to support their habits, and the worse their addiction, the more desperate their activities become. Their crimes run from petty theft to murder, with prostitution, particularly among girls and young women, being among the most prevalent and the most tragic. We find that narcotic pushers and users are frequently among our most cunning and most vicious cases because their unsatisfied cravings make them desperate.

Anything that can be done to control the narcotic traffic is crime prevention of the most effective kind. The prevention of one person from becoming a user is literally the prevention of hundreds of potential crimes. In fact, to prevent narcotics from reaching users can literally save lives. Only last month the newspapers carried the story of a man found dead in San Diego from an overdose of narcotics. Ironically, he would probably be alive today had it not been for the fact that in the month of May he was freed from a narcotics charge on the ground that the evidence against him had been illegally obtained. Did he -- or society -- benefit from the application of the "exclusionary rule" in this case?

The loss to society in money and tangible property attributable to the narcotics trade is staggering enough; but the loss in human misery, degredation and disease is incalculable. In this field, and in the field of dangerous weapons, it can be demonstrated most graphically how dangerous it is to compromise

with, to suppress, to exclude the TRUTH !

In considering the advisability of eliminating the so-called exclusionary rule, it should be emphasized that what is and what is not a reasonable search or seizure is not an absolute. It is not simply a matter of a police officer's doing that which he knows to be wrong that results in the application of the exclusionary rule. The courts themselves have no uniformity of opinion as to what is and what is not an illegal search or seizure. In fact, there is an astonishing fluctuation and division in court decisions. For example, reference to search and seizure cases of the United States Supreme Court reveals a striking situation: For example:

Olmstead v. U. S. (1928)	5 to 4, each dissenter announcing his reasons in 4 separate dissents
Goldstein v. U. S. (1942)	5 to 3, one not participating
Goldman v. U. S. (1942)	5 to 3, one not participating; the dissenters announcing their reasons in 2 separate opinions.
Wolf v. Colorado (1949)	6 to 3, one of the majority stating his reasons in a separate opinion; the dissenters announcing their reasons in 3 separate opinions
Brinegar v. U. S. (1949)	6 to 3, one of the majority stating his reasons in a separate opinion.
Stefanneli v. Minard (1951)	7 to 2, two of the majority concurred in an opinion based on reasoning separate from the majority
On Lee v. U. S. (1952)	5 to 4, each dissenter gave his separate reasons in a separate opinion, and as if that were not enough, one dissenter also concurred with one other dissenter.

decision * 2

Irvine v. California (1954) — 5 to 4; one of the majority gave his reasons in a separate opinion; the dissenters could not agree either and split upon their reasoning into two separate opinions. This decision is more properly characterized as a 4-1-2-2 decision, than a 5-4 decision.

Consider the Trupiano case. A federal agent, present with the consent of the property owner, noticed the odor of fermenting mash coming from a building. On moving closer he saw an illicit still in operation. He entered, placed the defendant under arrest and seized the still. In a 5 to 4 decision the court held that the evidence obtained should have been suppressed because there was no search warrant.

The enduring certainty of the law there announced guided our law enforcement officials for the lengthy period of some twenty months when the court in the Rabinowitz case, by a 5 to 3 decision, expressly overruled the Trupiano case.

When the highest court in the land tells the law enforcement officer now its 5 to 4 this way and now its 5 to 4 that way, is there any wonder that the policeman is perplexed? Should he be unwise enough to make a decision that a particular seizure would be illegal, whereas only 4 of the 9 Supreme Court Justices would have later concurred with him, he has failed to perform his statutory and sworn duty of apprehending criminals and preventing crime. He may thereby be subject to both criminal prosecution and disciplinary action for failure to do his duty.

But on the other hand, if he should decide to make a seizure, and only 4 of the Justices should later agree that it was a

reasonable ~~seizure~~ search, and the other 5 should hold it unreasonable, then the officer is viciously attacked, maligned and castigated, and likewise may be subject to both criminal prosecution and disciplinary action. All this because he missed by one the number of Supreme Court Justices who would agree with his spur-of-the-moment judgment.

But add to this confusion the exclusionary rule and we have confusion worse confounded. For now the public is vitally affected.

Suppose the officer makes a search or seizure which is later held to be unreasonable -- why the officer whose judgment is so bad that only 4 of the nine members of the Supreme Court agree with him, has by his unreasonable search forever granted to the criminal immunity from prosecution for his crime.

Of course, if the officer is one of our smarter officers whose judgment will be backed by 5 of the 9 Justices, then everything is all right.

But when the Supreme Court reverses itself, and a majority view of yesterday, holding a search reasonable when made, becomes the minority view before the case reaches the court, it is a little difficult for even our smartest officers.

To me it seems preposterous that our administration of criminal justice is so uncertain and confused, and that a criminal may be turned loose, forever freed from prosecution for his crime, because a police officer in good faith made a search or seizure held to be reasonable by 4 Justices of the Supreme Court, whereas 5 held it to be unreasonable.

That, of course, is our basic objection to the exclusionary rule.

The issue is not whether police should violate constitutional rights, but rather what will be the effect if an action taken by them should afterwards be held to be illegal. Shall society be punished, the truth suppressed, and criminals freed, because of the error of a policeman?

Certainly the officer should be held accountable if he wilfully violates constitutional rights. But do not free the criminal!

If there were more time, I could enlarge upon some of the problems that have been brought to our office by reason of the exclusionary rule. The answers to those problems, I trust, will be found in the report of the Attorney General's Committee, and I believe it would be more profitable to present these matters to you at ~~the same~~ That time.

Meanwhile, I thank you for the opportunity of appearing before you, and I offer you the cooperation of my office in your work.

Search Illegal--Bookie Case Upset

The State District Court of Appeal reversed a bookmaking conviction here yesterday on the ground San Francisco police conducted and "unreasonable and illegal" search of the defendant.

In a unanimous opinion written by Presiding Justice Raymond E. Peters the court also delivered a forthright endorsement of the State Supreme Court's ban against use of illegally obtained evidence in trials.

The defendant was Lonzo Wilson who was granted probation a year ago after being convicted in Superior Court of two count sof bookmaking.

VAGRANCY ARREST

Police arrested him outside a restaurant at 236 Townsend street. They had had him under surveillance for three weeks.

According to the court records, Wilson was taken into custody a sa vagrant, and a later search of his person and auto turned up slips of paper on which bets had been recorded.

"The arrest for vagrancy was an obvious subterfuge to try and secure evidence of bookmaking . . ." the District Court Justices said. "All that appears in the record is that the police, for some undisclosed reason, decided to keep a certain restaurant and pool hall under surveillance. Whatever that reason may have been, it certainly was not for the purpose of finding evidence that the defendant was a vagrant."

OVERZEALOUS POLICE

The Justices concluded they had before them a case of "overzealous law enforcement."

They declared the court rule against illegal evidence "is based on fundamental principles of morality."

...e Ends

boys to San Francisco.

The third statement was from Dr. John F. Carey, a pediatrician in Joliet, Ill., who examined Dr. Block's sons in the summer of 1955 and found their physical condition "a little below average, but not seriously."

The case will continue today.

Ex F

COPY

not read into record

STATE OF CALIFORNIA

OFFICE OF LEGISLATIVE COUNSEL

Sacramento, California
May 19, 1955

Honorable H. Allen Smith
Assembly Chamber

Brief of People v. Cahan,
44 A.C. 461 - #11342

Dear Mr. Smith:

Defendant was charged with conspiring to engage in horse-race bookmaking and related offenses in violation of Section 337a of the Penal Code and was convicted. He was granted probation and appealed from the order granting probation and the order denying his motion for a new trial. The Supreme Court reversed these orders by a 4 to 3 decision.

Most of the incriminatory evidence introduced at the trial was obtained by police officers in violation of the prohibitions against unreasonable search and seizure in the United States Constitution (Fourth and Fourteenth Amendments) and the California Constitution (Art. I, Sec. 19) and state and federal statutes (Secs. 146 and 602, Pen. C.; 18 U.S.C.A. Secs. 241, 242; 42 U.S.C.A. Sec. 1983). Some of this evidence was obtained by installing microphones in certain houses, after breaking and entering, and recording conversations carried on in these houses in nearby garages to which wires from the microphones led. The court also stated that in addition "there was a mass of evidence obtained by numerous forcible entries and seizures without search warrants." Overruling prior decisions to the contrary, e.g., People v. Le Doux, 155 Cal. 535 and People v. Moyen, 188 Cal. 237, the court held that illegally obtained evidence is inadmissible and it was on that ground that the trial court and orders were reversed.

The court noted that neither the Fourth nor Fifth Amendment bars the admission of illegally obtained evidence, and that the federal exclusionary rule is a judicially created rule. Likewise it has been held that the Fourteenth Amendment, in which the prohibition against unreasonable searches and seizures is incorporated, does not of itself require the exclusion of evidence so obtained (Wolf v. Colorado, 338 U.S. 25). However, the court quoted from the majority opinion of the United States Supreme Court in Irvine v. California, 347 U.S. 128, as follows:

> "'Now that the Wolf doctrine /the guarantee of the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth/ is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the /exclusionary/ rule would be an unwarranted use of federal power.' (347 U.S. at p. 134.) Thus, after states that rely on methods other than the exclusionary rule to deter unreasonable searches and seizures have had an opportunity to reconsider their rules in the light of the Wolf doctrine, the way is left open for the United States Supreme Court to conclude that if these other methods are not 'consistently enforced' and are therefore not 'equally effective' (see Wolf v. Colorado, supra, 338 U.S. 25, 31), the 'minimal standards' of due process have not been met."

The court stated that pursuant to this suggestion it had reconsidered the rule heretofore followed that the unconstitutional methods by which evidence is obtained do not affect its admissibility and had carefully weighed the arguments for and against the exclusionary rule. Setting forth the arguments against the exclusionary rule, the court stated it nevertheless reached its conclusion favoring the rule "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers."

"If those /constitutional guarantees against unreasonable searches and seizures/ were being effectively enforced by other means than excluding evidence obtained by their violation, a different problem would be presented." But, the court noted, reported cases involving civil actions against police officers are rare, and those involving criminal prosecutions against officers are nonexistent.

The court refused to draw a distinction between the state acting as prosecutor and the state acting as judge, saying that "Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants . . . a fortiori, they should not extend that aid and thereby permit the consummation of illegal schemes by the state itself" and adding that "it is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law."

The court noted the argument that in some cases officers have no choice of securing evidence by legal means and that in many cases the criminal will escape if illegally obtained evidence cannot be used against him. This contention, said court, is not properly directed at the exclusionary rule, but at the constitutional provisions themselves.

The court concluded with a statement that it was not, in effect, adopting all details of the federal rule and that the details of the rule it had just announced were yet to be worked out. The court stated:

> "We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure. The validity of this contention need not be considered now. Even if it is assumed that it is meritorious, it does not follow that the exclusionary rule should be rejected.
>
> "In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them. Under these circumstances the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime."

The three dissenting justices noted that in adopting the exclusionary rule the majority was deviating from the rule in effect in the great majority of states and the British Commonwealths, which rule was supported by "the majority of the most eminent legal scholars." They indicated that they thought the criminal sanctions and civil remedies at present provided by law are sufficient to give the victim of an illegal search or seizure adequate redress.

The dissenters said that the effect of the federal exclusionary rule was often to free obviously guilty persons, and, in addition, the determination of the question whether evidence sought to be introduced had been illegally obtained is often a delicate one, and the determination often requires a lengthy interruption of the trial. In effect, they said, the exclusionary rule deprives society of its remedy against one lawbreaker because he has been pursued by another. They quoted with approval language from the majority opinion of the United States Supreme Court in the Irvine case to the effect that the exclusionary rule was actually only a mild deterrent to the commission of illegal searches and seizures.

The dissenters further asserted that one virtue of the former California rule that could not be denied was its certainty, and that the rule announced by the majority would create great uncertainty. As the majority had stated that "workable" rules were yet tobe worked out, there were, in the meantime, no rules to guide the trial courts.

The dissenters would have preferred that the non-exclusionary rule be kept and that the Legislature, for example, consider the imposition of civil liability for the illegal practices upon the governmental unit employing the offending officer, in addition to the liability now imposed upon the officer himself, and that the Legislature consider also fixing a minimum amount to be recovered as damages in the same manner as in actions for invasion of other civil rights (Sec. 52, Civ. C.).

In accordance with your request we would like to add a few comments on the effect of the decision.

In their opinion the majority quote with approval the statement of Justice Black in his concurring opinion in

Wolf v. Colorado, cited above, that "the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Elsewhere in this opinion the majority justices say that "It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." In the light of these statements it appears that the Legislature could, if it desired to do so, override by statute the rule announced in the Cahan case and restore the rule that formerly prevailed in this State. However, the Irvine case suggests the possibility that the United States Supreme Court, or even the California Supreme Court, may in the future conclude that the guarantee of due process itself imposes the exclusionary rule on the states. Or, if the Legislature favors the exclusion of illegally obtained evidence generally but desires to provide "workable rules" for application of the principle it could do so.

The decision would seem to leave open the possibility that the Legislature could devise means of discouraging illegal searches and seizures that would be so effective as to render the exclusionary rule no longer necessary, though now that the exclusionary rule is in effect in California there might be some difficulty in demonstrating to what extent any such statute, rather than the exclusionary rule, was deterring the commission of illegal searches and seizures, if the two were in effect concurrently.

The dissenters suggested as an alternative to the exclusionary rule the imposition of statutory liability on the governmental unit which employs an officer who makes an illegal search or seizure, possibly with a statutory minimum recovery for the aggrieved party. Statements in the majority opinion indicate that the majority justices would be skeptical of the worth of such provisions. Thus, the majority quoted with approval from the opinion of Justice Jackson in Irvine v. California, 347 U.S. 128, that if an illegal search or seizure turns up nothing incriminating the innocent victim usually does not care to take steps which air the fact that he has been under sus-

picion. This suggests the possibility that the court might deem the desire to avoid negative publicity a more important factor than the certainty of a money recovery in determining whether a victim will seek civil redress for an illegal search or seizure.

Very truly yours,

Ralph N. Kleps
Legislative Counsel

By
Terry L. Baum
Deputy

TLB:bc

Exhibit

In transcript

Proposed new section of Code of Civil Procedure:

§ 1873: Evidence shall not be excluded in any criminal ~~prosecution~~ proceeding merely because it has been obtained in an illegal manner.

Exhibit VIII

CALIFORNIA LAW OF ARREST

Suggested Revision of. (Preliminary Report)

The problems encountered and the remedies available to police officers in California have, in some respects, outrun the written law. This is not surprising when it is noted that the pertinent statutes have not been materially altered since 1872. Since then, a number of innovations have had considerable impact on the techniques of lawbreaking and law enforcement. Actually, the California law of arrest is a good deal older than 1872, since it is based almost completely on provisions of the proposed code of criminal procedure reported to the New York legislature in 1850, which, in turn, had its roots far back in the common law. What is even more significant than the gulf that lies between the arrests of a century or two ago and the technologically complicated world of today is the emergence, since the days when the rules were being evolved, of vastly expanded structures of organized crime on the one hand and professional law enforcement agencies on the other.

The law of arrest by peace officers illustrates the discrepancy between existing statutes and the developments in case law which have attempted to keep pace with the modern requirements of law enforcement. The former not only antedates the modern police department, but was developed largely during a period when most arrests were made by private citizens, when bail for felonies was usually unattainable, and when years might pass before the royal judges arrived for a jail delivery. Further, conditions in the English jails were then such that a prisoner had an excellent chance of dying of disease before trial. Today, with few exceptions, arrests are made by police officers, not civilians. Typically, they are made without a warrant by officers in patrol cars, often in response to requests coming over the police radio, sometimes from distant cities. When a citizen is arrested, his probable fate is neither bail nor jail, but release after a short detention in a police station. As a result of the antiquated statutes the general

public and most law enforcement officers have no readily available source of information as to the law of arrest. They are required to search the records of reported cases in the State of California in order to determine the modern interpretations of the law which in some instances affirms and in others modifies or even contradicts the language of the statute. It is with a thought of reducing these interpretations to codify the law in keeping with requirements of modern law enforcement that the following amendments are suggested.

Such considerations led the Interstate Commission on Crime to decide that a study of the law of arrest should be made in order to determine the possibility of drafting a model act to reconcile the law as written with the law as applied. A committee was appointed in 1939 and as a result of the combined efforts of judicial and law enforcement officers, a proposed Uniform Arrest Act was devised. In 1941, the Interstate Commission on Crime and the International Association of Chiefs of Police approved the general principles of the Act. The principles embodied in this model act were adopted by the following states, New Hampshire, Rhode Island, Delaware, and Massachusetts. In preparing these amendments we have patterned them on the Uniform Law of Arrest as well as decisions of our appellate courts which have interpreted our present statutes.

Section 832. Questioning and Detaining Suspects.

This is a new section incorporating a principle set forth in subsection 2 of the Uniform Arrest Law and which right was recognized as common law and although never incorporated into the statute law of California has been enacted in Massachusetts, (Massachusetts General Laws, 1932, Chapter 41, Section 98) and New Hampshire (New Hampshire Public Laws, 1936, Chapter 36, Section 12 and New Hampshire Public Laws, 1941, Chapter 163). In California the right to detain without arrest is recognized in the case of Gisske v. Sanders 9 Cal. App. p. 13 and Pon v. Wittman 147 Cal. 282. The first case involved the right of a police officer to stop, question and take a person to the police station for further questioning, under suspi-

cious circumstances. The Pon v. Wittman case involved an injunction sought to prohibit police officers from questioning persons approaching a house of prostitution.

It is to be noted that Penal Code Section 836 does not, according to California cases, contain an exclusive list of lawful arrests, to wit, People v. Ballen 21 Cal. App. 770, where the court stated that although not contained in any statute there was no question as to the right of a peace officer to arrest a person about to commit a felony and in People v. Hupp 61 Cal. App. 2nd at 447 and Cristal v. Police Commission 33 Cal. App. 2563 to the effect that officers could make an arrest to prevent the commission of additional crimes and to protect citizens' lives.

Section 833. Searching for Weapons Persons Who Have Not Been Arrested.

The law recognizing a universal right to search arrested persons for weapons is based on two reasons, first of which is applicable to searching a person who is detained for questioning only. "No matter now innocent the person may appear there is always a possibility that he is armed and the officer is not required to run the personal risk of holding a person in custody without finding out by the only sure method -- a thorough search." Mechem Law of Search and Seizure, p. 62, citing People v. Cheagles 237 New York 193, 142, Northeast 583. It is to be noted that the lack of a right to search before arrest springs from the days when arms were swords, bows or arrows. Had hoodlums of that day been armed with 4-inch pistols there would have been no such distinction.

Section 834a. Resisting Arrest.

This is a new section incorporating the principles of Section 5 of the Uniform Arrest Law. Although no statute in California prohibits resistance the courts have stated their views in the following language: "It is the duty of a citizen to obey the commands of a peace officer given in his line of duty. If the officer is exceeding his authority, the recourse of the citizen is to the

courts, and not to open resistance." People v. Yuen 32 Cal. App. 2d, 151. In People v. Spear 32 Cal. App. 2d, 165 the court stated, "The law does not countenance a breach of the public peace in order to enforce a private right. Courts are created for the purpose of determining those rights, and any other rule would result in private battles going on at various times and place, to the great inconvenience of the general public. Such a rule is not to be accepted or approved."

Section 835a. Arrest. Permissible Force.

This is a new section incorporating the principles of the Uniform Arrest Law but modified to meet California requirements and simplified to reflect the consistent holdings of the appellate courts concerning the use of force in connection with arrests, escapes and resistance. In each case the question before the court has been one of reasonableness, therefore this section is based entirely upon the use of a reasonable force under the circumstances.

Section 842a. Arrest Under a Warrant Not in Officer's Possession.

This is a new section incorporating the principles advocated by the Uniform Arrest Law, Section 8. The present requirement of Section 842 is virtually impossible in performance in a large municipality where there are many police officers. A warrant is generally held in the main office and it is a rare exception that the police officer has the warrants on hand at the time he has the opportunity to make the arrest. This section will enable him to conform to the requirements of Section 842 by producing his warrants within a reasonable time.

Section 849a. Release of Persons Arrested.

This incorporates Section 10 of the Uniform Arrest Law which is a practical approach to a current problem facing large municipalities and smaller communities on occasion. Under the present California law an arrest once commenced must be carried through in order to give the officer any protection from civil

liability. This new section recognizes that many arrests are made upon valid grounds and that prior to completion of the arrest the suspicion motivating that arrest is removed. This will allow law enforcement officers to legally release persons at the moment the probable cause for the arrest is dissipated. It will further authorize a procedure now practiced in the interests of expediency and justice, namely, the releasing of minor offenders such as intoxicated persons at the first moment they can be safely trusted upon the street. The justification for this measure rests mainly on humanitarianism, economy and general expediency. Paragraph "b" provides the framework for future regulations permitting a like disposition of certain minor misdemeanors upon citation rather than immediate arrest, such as is found in the Vehicle Code.

It is recommended that the following sections be amended to read as follows:

Section 835. How an Arrest is Made and What Restraint Allowed.

It is suggested that the section is amended by striking the entire last sentence, this being a negative approach to the problem covered in 835a by allowing only reasonable force.

Section 836. Arrest by Peace Officers. (Arrest Under Warrant or Without Warrant in Certain Cases Authorized.)

This section is to be amended by changing only the authorization to arrest without warrant by incorporating the decision of the Supreme Court of California in Coverstone v. Davies, 38 Cal. 2d 315, into the statutory authorization to arrest for a misdemeanor, and to cover in one subsection all of the grounds heretofore allowed for arrests for a felony; to provide authorization for an arrest of a person who has actually committed a felony regardless of what offense the officer may have believed him to have committed prior to the arrest. Authorization for this law is found in People v. Young, 137 Cal. 699.

Subsection 2 of the present Penal Code Section 836

provides that an officer may make an arrest of a person who has committed a felony, although not in the presence of an officer. It is not clear from this section whether or not this is an embodiment of the common law rule which provides that an officer may make an arrest of a person who has in fact committed a felony although the officer has no probable cause for believing that he has committed a felony. For that reason it is felt that this section needs clarification. An expression of the common law rule is found in Baltimore and O. R. Co. v. Cain (1895) 81 Md. 87, 31 Atl. 801, 28 L.R.A. 688.

Section 840. (When Arrest May Be Made, Felony, Misdemeanor.)

This section is felt to relate only to arrests under warrant and perhaps some redrafting could clarify that thought. The amendments here suggested are to include an attempt as well as the actual commission, and to include the rule of Coverstone v. Davies, 38 Cal. 2d 315, on misdemeanor arrests where the officer has probable cause to believe that the misdemeanor is being committed in his presence.

Section 842. Warrant Must Be Shown, When.

This amendment is requested solely to change the word "required" to "requested". It is noted that one of the synonyms of "required", although antiquated, is "requested". This amendment is suggested for the purpose of modernizing the language.

Section 844. Door or Window May Be Broken In Making Arrest, When.

This amendment adds the words "with or without a warrant", in order to clarify the application of this section to arrests of all types. This amendment is felt necessary because of the place where this appears following other sections on arrest under warrants. The added words are simply to insure its application to arrests with or without a warrant.

Section 845. The same reasons given for the amendment to

Section 844 apply to the proposed amendment to Section 845.

Section 849. (Person Arrested Without Warrant Shall Be Taken Before Nearest Magistrate: Complaint to be Laid.)

Two amendments are proposed to this section, the first to add the words "if not otherwise released", in order to be consistent with a proposed new section heretofore discussed allowing release prior to booking; the second change to add the words "and if reasonably possible within two court days after his arrest," in order to conform to the present language of Section 825 which reads, "in any event within two days, excluding Sundays and holidays". The change in the words "in any event" to "if reasonably possible" would take care of any possible emergency facing the community wherein arraignment might reasonably be delayed for purposes of great importance.

An act to amend Sections 835, 836, 840, 842, 844, 845, 849 of, and to add Sections 832, 833, 834a, 835a, 842a and 849a to the Penal Code, relating to arrests.

The People of the State of California do enact as follows:

SECTION 1. Section 835 of the Penal Code is amended to read:

835. How an arrest is made and what restraint allowed. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of an officer. ~~The defendant must not be subjected to any more restraint than is necessary for his arrest and detention.~~

SEC. 2. Section 836 of the Penal Code is amended to read:

836. Arrests by peace-officers: [Arrest under warrant or without warrant in certain cases authorized]. A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a ~~public offense committed or attempted in his presence,~~ misdemeanor whenever:

(A) He has reasonable ground to believe that the person to be arrested has committed a misdemeanor in his presence.

2. ~~When a person arrested has committed a felony, although not in his presence.~~ For a felony whenever:

(A) He has reasonable ground to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

(B) A felony has been committed by the person to be arrested although before making the arrest the officer has no reasonable ground to believe the person committed it.

~~3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.~~

~~4. On a charge made, upon a reasonable cause, of the commissio of a felony by the party arrested.~~

ACRAMENTO BEE

Police Chief Dislikes Bar Of Due Processes

Los Angeles Police Chief William A. Parker has joined those sniping at the state supreme court's Cahan decision which outlawed unreasonable search and seizure. In a stupendous fracturing of logic Parker insists this requirement that law enforcement officials observe the law has caused a walloping increase in his city's crime.

There are basically two kinds of police forces. One accepts the strictures of civil rights and by hard, intelligent police work does its job. Such forces usually turn in a top performance and in the process they set an example of respect for the law.

The other type of police operation is to howl and lament about the need for powers to tap telephones, bug private rooms and smash into a man's house on the vague suspicion there may be some evidence hanging around.

All the court said in the Cahan case is that the police to search a man's premises or invade his privacy must establish reasonable evidence of a crime. Right after that decision, Parker insists, Los Angeles had a big jump in such crimes as rape, automobile theft, assaults and the like.

Here is a marvelous example of the fallacy of reasoning known as "after this, therefore on account of this." The court renders a decision, crimes increase, therefore the court caused the increase. Actually there is no relationship of cause and effect in most of these crimes. If someone is going to commit an act of violence, such as rape or assault, does he stop to read the Cahan case? Would bugging his room reveal intent to commit crimes which have no intent?

The only safe police force is one which can do its job within the framework of the Bill Of Rights and due processes of law.

Parker seems to be complaining because the police are not accorded the privilege of running a lawless administration of justice.

INCOME PROPERTY—RESIDENTIAL

3 HOUSES. $115 Income Plus room home. $10,000. Own Dial GL 1-7901.

$220 MONTH INCOME For O $2,500 down. 4 new units. To and Country area. IV 9-65 agent.

TO SETTLE ESTATE. Nr. Sut Hosp. Comp. furn., fully occupi Present $4,200 GI 4% mtg. To price $11,500. Exec., IV 7-38

DUPLEX—BY OWNER. $18,6 2 bedrooms each. Near bus, sch & shopping. See to apprecia Principals only. Dial GL 7-59

HAVE Ready Buyers For Good P ducing income property in Sac mento area. Call Bill Zimmerma HU 1-4981, 1725 J St. or 9-7730. Agent.

Near State Bldgs., nine units, furnished but one, grossing $593. per mo. Excellent investment, ava able on terms. Call Boruff Smi GL 7-5835, or MacBRIDE REALTY CO. 2101 Capitol Ave. GI 2-36

COMMERCIAL

100' on Rio Linda Blvd., No. Sac with 4 room house on front. Th sleeping cabins in rear, only 2 ye old. Possible income of $200 month. Cash down or will exchar for home in nice area. Jim Brewi GL 1-0832 or Keith Friel, 1-8143.

JOE RUZICH, Realtor
3751 Stockton Blvd. GL 1-28

A Challenge

TO YOUR SHREWDNESS, FRO AN INVESTOR'S STANDPOINT. APARTMENTS, 2 SLEEPIN ROOMS, 1 GARAGE AND PAR ING LOT. CLOSE-IN. AT ON $19,500. RETURNS $325 EA MONTH. TERMS.
Harold Wentzel, GL 7-6065
JOE RUZICH, Realtor
3751 Stockton Blvd. GL 1-28

Duplex Special!

Tahoe Area. What a buy! Bra new! 2 bedrooms with wardro closets, beautiful kitchen, serv porch, big living plus dining roo Detached garages for each u Really an excellent buy at o $15,750. Bus and shopping wit 2 blocks. See day or night, ask Mr. R. A. "Bud" Lewis, GL 7-37 HU 1-2741.

Jones & Brand & Hull

725 Jay St. INC. HU 1-27

Commercial and Industrial Property—For Sale or Lease

CHECK THIS. Prime 144 Feet Fulton Ave. C. Bell. IV 9-48

STORE Building With 4-Room A By owner. Priced to sell. WA 5-63

8 INDUSTRIAL Acres. All Or Pa Close in. $2,750 per acre. Ev dial GL 6-6890 or GI 3-3793. A

IF YOU Need Warehouse Space will build to suit. Dial GI 1-39 Agt.

FOR LEASE. 3,200 Sq. Ft. Ne 21st and L. Call Tom Dovi Re ty Co., HU 1-1491.

40x160 FT. Commercial Lot. 1,2 sq. ft. modern office. 15th & Sts. Only $49,500. IV 9-3429. A

21st Street COMMERCIAL 60x153, excellent access. 3 sid near BEE.
Springman Realty Co. GI 2-69

Booming Carmichael For Lease!

Retail building, 6141 Fair O Blvd. Call Mr. Schoeffler, IV 7-58 or IV 7-8825. Agt.

Auburn and Manzanita
3 Acres
5 motel units. Large fronta each street. Ample room for serv station or market. Reasonable. C Mr. Scott. IV 7-5341 or

BEQUETTE

2221 Arden Way WA 2-34

FOR LEASE: Manufacturing warehouse space. 2 story re forced concrete bldg. Situated a lot ½ block square located the heart of the industrial are Approx. 10,000 square feet usable space inside building, pl plenty of loading & parking fac Paoli, GI 3-393

~~5. At night, when there is reasonable cause to believe that he has committed a felony.~~

SEC. 3. Section 840 of the Penal Code is amended to read:

840. [When arrest may be made: Felony: Misdemeanor.] If the offense charged is a felony, the arrest may be made on any day and at any time of the day or night. If it is a misdemeanor, the arrest cannot be made at night unless upon the direction of the magistrate, endorsed upon the warrant, except when the offense is committed, or attempted, in the presence of the arresting officer, or when the arresting officer has reasonable cause to believe a misdemeanor is being committed or attempted in his presence.

SEC. 4. Section 842 of the Penal Code is amended to read:

842. Warrant must be shown, when. If the person making the arrest is acting under the authority of a warrant, he must show the warrant, if ~~required.~~ requested.

SEC. 5. Section 844 of the Penal Code is amended to read:

844. [Door or window may be broken in making arrest, when.] To make an arrest, with or without a warrant, a private person, if the offense be a felony, and in all cases a peace-officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired.

SEC. 6. Section 845 of the Penal Code is amended to read:

845. Same: [Breaking door or window in leaving lawfully house entered to make arrest.] Any person who has lawfully entered a house for the purpose of making an arrest, with or without a warrant, may break open the door or window thereof if detained therein, when necessary for the purpose of liberating himself, and an officer may do the same, when necessary for the purpose of liberating a person who, acting in his aid, lawfully entered for the purpose of making an arrest, and is detained therein.

SEC. 7. Section 849 of the Penal Code is amended to read:

849. (Person arrested without warrant to be taken before nearest magistrate: Complaint to be laid.) When an arrest is made without a warrant by a peace-officer or private person, the person arrested, if not otherwise released, must, ~~without unnecessary delay~~, be taken before the nearest or most accessible magistrate in the county in which the arrest is made without unnecessary delay, and if reasonably possible within two court days after his arrest, and a complaint stating the charge against the person, must be laid before such magistrate.

SEC. 8. Section 832 is added to the Penal Code, to read as follows:

832. Questioning and Detaining Suspects.

(1) A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going.

(2) Any person so questioned who fails to identify himself or explain his actions may be detained and further questioned and investigated.

(3) The total period of detention provided for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested for a public offense.

SEC. 9. Section 833 is added to the Penal Code, to read as follows:

833. Searching for Weapons. Persons Who Have Not Been Arrested.

A peace-officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in

section 832, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person.

SEC. 10. Section 834a is added to the Penal Code, to read as follows:

834a. Resisting Arrest.

If a person has reasonable ground to believe that he is being arrested by a peace officer, it is his duty to refrain from using force or any weapon in resisting arrest.

SEC. 11. Section 835a is added to the Penal Code, to read as follows:

835a. Arrest--Permissible Force.

1. A peace officer who has reasonable cause to believe that the person to be arrested has committed a felony, or has committed a misdemeanor in his presence, may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

2. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

SEC. 12. Section 842a is added to the Penal Code, to read as follows:

842a. Arrest under a warrant not in officer's possession. An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but if the person arrested so requests it, the warrant shall be shown to him as soon as practical.

SEC. 13. Section 849a is added to the Penal Code, to read as follows:

849a. Release of Persons Arrested.

(1) Any officer in charge of a police department or any officer delegated by him may release, instead of taking before a magistrate, any person who has been arrested without a warrant by an officer of his department whenever:

(A) He is satisfied either that there is no ground for making a criminal complaint against the person or that the person was arrested for drunkenness and no further proceedings are desirable.

(B) The person was arrested for a misdemeanor and has signed an agreement to appear in court at a time designated, if the officer is satisfied that the person is a resident of the state and will appear in court at the time designated.

(2) A person released as provided in this section shall have no right to sue on the ground that he was released without being brought before a magistrate.

California Federation of Women's Clubs

3. RE EXCLUSION OF CRIMINAL EVIDENCE

WHEREAS, The recent ruling of the California Supreme Court against admission of certain evidence, obtained without a search warrant or from secretly installed listening devices, has thrown the administration of justice into confusion and in innumerable cases made it impossible for police and District Attorneys to prosecute known, and in some cases admitted, criminals; and

WHEREAS, It is reported that as a result of this ruling there has been since last April a decrease of from twenty to thirty per cent in narcotics arrests and a decrease of two-thirds in narcotic convictions, and under a like rule a Federal Court, while not questioning the guilt of Judith Coplan, nevertheless freed her, because vital security papers to be handed to a Soviet agent and which proved her guilt, were obtained from her handbag without a search warrant; and

WHEREAS, By such rule is is society that is being punished, because persons guilty of most serious crime, even murder, may be free due to an over-technical regard for the individual as against society; Therefore

RESOLVED, That the California Federation of Women's Clubs in convention assembled at Berkeley, May 1956, earnestly urges upon our judiciary, our legislators, law enforcement officers and our citizens, the necessity for most careful consideration of such appropriate action by legislation or otherwise as will preserve the rights of our people under the Fourth Amendment of our Constitution against "unreasonable" searches and seizures,but will not by interpretation so restrict its operation as to protect the guilty from conviction and punishment for proven crime; and further

RESOLVED, That copies of this Resolution be sent to Honorable Goodwin J. Knight; the Justices of our Supreme Court; the California Bar Association; Edwin J. Regan, Chairman of the State Senate Judiciary Committee; and H. Allen Smith, Chairman of the State Assembly Judiciary Committee.

Endorsed by San Francisco District.

Mrs. Gerald Whitaker, President
800 Contra Costa Avenue
Berkeley 7, California

SAN FRANCISCO EXAMINER
SUNDAY, April 29, 1956

The Big Upheaval

How High Court Upset Forces of Justice in State

New State Criminal Rules Are Analyzed

The Examiner presents here the first in a series of articles analyzing the new rules promulgated by the California Supreme Court, which bar from criminal cases any evidence obtained illegally by law enforcement officers.

By FRANCIS B. O'GARA

On April 27, 1955, four justices of the State supreme court gave vent to the biggest judicial upheaval in California history.

The four learned justices were concerned over certain excesses on the part of policemen. They felt that too many were being unfair to too many criminals. Not that the officers were being brutal! It was just that they were being "unreasonable" in making searches and seizing evidence of crime. And this, the four distressed justices could stomach no longer. It had become poison to them!

Since they formed a majority on the seven man supreme court, they had no trouble finding a remedy. They chose what they assumed would be a cure all for the police tactics that caused their malaise.

Sugar Coating——

Once selected, the remedy was applied "liberally," occasionally with sugar coating. The first application caused a revolutionary change in the administration of criminal justice in California, a change that gave the criminal defendant the greatest break he had ever received.

The four justices decreed that any evidence of crime obtained by what a judge deems an "unreasonable" search or seizure within the meaning of the Fourth Amendment to the Federal Constitution cannot be used, even though the defendant is caught in the act of committing the offense charged and even though the Constitution does not require its exclusion.

A statewide practice followed without exception since the gold rush was thus summarily outlawed.

Earlier supreme court decisions, upholding the former rule, were sweepingly repudiated. And these included several in which two members of the now dyspeptic majority had blithely concurred.

Unseemly Conduct——

In law enforcement circles, this history-making upheaval was considered most unseemly judicial conduct.

Police and prosecutors alike had suddenly lost a powerful weapon for the war on crime. With one judicial stroke, the dirty business of catching and convicting criminals had been transformed into what many of them regard as a genteel process with insuperable odds in favor of the enemy. Obviously, of course, their work had been made extremely more difficult, too. Their agonized cries reverberated from Siskiyou to San Diego.

On the other hand, the decision whetted the appetite of the criminal lawyer, and of every hoodlum and racketeer with brains enough to catch the implications or money enough to have an

(See UPHEAVAL, Page 16, Col. 1)

The Big Upheaval

L. A. Hoodlum First Beneficiary of Ruling

(Continued from Page 1)

attorney spell them out for him.

The rest of the citizenry, the little people with latent power to fire any judge, district attorney or policeman and to make any rules they like for lawbreakers, didn't say or do much of anything. Most of them are probably still wondering what the fuss is all about. And some couldn't care less.

The initial blast by the four justices was followed by twenty-three aftershocks in the succeeding ten months. Some of these struck the law enforcement officers with even more devastating effect than the grand-daddy effusion of April 27, 1955.

Before the last one subsided, criminal justice in California had acquired a distinctly new look. The supreme court had rewritten the rule book on the law of arrest and on many phases of criminal procedure—and the revisions were drastic.

These are some of the more striking results:

1—California judge-made law now holds, as it never held before, that it is more desirable to turn loose an obviously guilty criminal than to convict him on evidence obtained by arresting officers who fail to observe hairsplitting, legalistic niceties.

2—Untapped new loopholes to immunity have been provided for the future lawbreaker, whether his crime be murder, kidnaping, robbery or selling narcotics to children.

3—Such hitherto routine police methods as the roadblock, a frequently employed device when a dangerous criminal is at large, are illegal if indiscriminate searching of cars is involved.

4—The "hunch" arrest, which has led to the capture and conviction of innumerable criminals, is strictly verboten—no matter how well it pays off.

5—The term "miscarriage of justice" and a State constitutional amendment adopted in 1914 have been given a grotestque new meaning by decisions that released convicted defendants, although the court conceded they were in fact guilty. This was the amendment in which the people themselves, nauseated by the spectacle of guilty defendants escaping on legal technicalities, took corrective action. The amendment says that no conviction shall be set aside because of the improper admission of evidence unless the court believes the error has resulted **"in a miscarriage of justice."**

6—Under California law, evidence obtained through the most outrageous abuses of privacy by "the private eye" is admissible but evidence of the most despicable crime obtained by a well meaning but over zealous law enforcement officer, who oversteps some vague, undefined boundary line, must be rejected.

7—Incongruous as it may seem, any private citizen now has more power than the professional law enforcement officer in many situations to make arrests, conduct searches and seize evidence of crime.

NEW DEAL.

The new deal for criminal defendants was dealt the day before Stephanie Bryan, the 14 year old kidnaped and murdered Berkeley girl, disappeared last April.

There was no connection whatever, but the coincidence in time suggests a graphic illustration of what the new deal really means.

Suppose that on the day the child vanished, some alert police officer — acting purely on a hunch — stopped the kidnap car. There was nothing "apparent to his senses" and he had no information that anything was wrong. He just didn't like the looks of the car or the driver.

Suppose he questioned the driver but that the questioning elicited nothing **"inconsistent with innocence."** Suppose he decided to play out his hunch anyway; that he searched the car and found evidence of a kidnap-murder.

Lawyers insist that under the supreme court's new doctrine, the evidence would be inadmissible. And obviously, the lawyers have something.

A search, says the supreme court, cannot be justified by what it turns up.

Los Angeles, California, Friday, March 2, 1956

MOSK HAILS CAHAN DECISION AS 'LANDMARK IN CONSTITUTIONAL LAW'

"I am convinced that the Cahan decision will come to be recognized as a landmark in California constitutional law," Superior Court Judge Stanley Mosk told the Democratic Luncheon Club yesterday.

Judge Mosk described the history and explained the effects of the much discussed State Supreme Court ruling on the use of illegally obtained evidence: the rule of illegal searches and seizures, to the Democratic Club.

Law enforcement officers will have to work harder and use more scientific methods, the jurist said, but he indicated that the rule has not materially hindered crime prevention. Judge Mosk quoted from a speech by District Attorney Roll who said that arrests and convictions are not down because of the rule.

Criticizes TV Show

Chief of Police William Parker was criticized by Judge Mosk for what he described as "a one-man campaign" to set aside a ruling of the State Supreme Court. He was also critical of a recent television program which attempted to show that police officers had to let criminals go free because of the rule. Judge Mosk said that Parker knew the facts in this show were not accurate before it was shown. (Judge Mosk was referring to a recent "Dragnet" television program which was shown at a recent legislative hearing on laws of arrests and searches. Sponsors of the program had attempted to get clearance from the District Attorney's office because of the reference to a "D.A.'s" instruction to police about the use of evidence. This release was refused but the sponsors used the program anyway.)

Guests at the luncheon, which had a capacity attendance, were Supervisor John Anson Ford, Attorney Morris Lavine, Assistant to the Attorney General Rudy Pacht, Nevada Assemblyman George Harmon and Robert Fleming, Democratic candidate for Congress in the 16th District.

Judge Mosk said that the Cahan rule would mean a return to the use of the search warrant. He said that in 13 years on the Bench he had had only one request for a search warrant and that single application came on Lincoln's birthday, this year.

A former assistant to Governor Culbert Olson, Mosk, at the time of his appointment, was the youngest man ever to serve on the Superior Court. In one of his elections he received the highest vote ever given a candidate for the Superior Bench in California. He has served in every branch of the court including a short period on the District Court of Appeal. He is now assigned to the Santa Monica branch.

STATEMENT OF CHIEF OF POLICE W. H. PARKER TO BE FILED WITH THE ASSEMBLY JUDICIARY SUBCOMMITTEE ON ILLEGAL SEARCHES, SEIZURES AND THE LAWS OF ARREST IN CONJUNCTION WITH THE HEARING TO BE HELD IN LOS ANGELES ON JANUARY 11 AND 12, 1956.

The Supreme Court of California, in a four to three decision on April 27, 1955, in the case of People v. Cahan, imposed the exclusionary evidence rule upon the courts of this state. The decision is contained on page 17 of the opinion and is as follows: "Despite the persuasive force of the foregoing arguments, we have concluded, as Justice Carter and Justice Schauer have consistently maintained,* that evidence obtained in violation of the constitutional guarantees is inadmissible. People v. LeDoux, 155 Cal. 535, People v. Mayen, 188 Cal. 237, and the cases based thereon are therefore overruled.**" The effect of this decision has been catastrophic as far as efficient law enforcement is concerned. Subsequent events have more than justified the warning sounded by Justice Spence in his dissent when he said, "The experience of the federal courts in attempting to apply the exclusionary rule does not appear to commend its adoption elsewhere. The spectacle of an obviously guilty defendant obtaining a favorable ruling by a court upon a motion to suppress evidence or upon an objection to evidence, and thereby, in effect, obtaining immunity from any successful prosecution of the charge against him, is a picture which has been too often seen in the federal practice. In speaking of an obviously guilty defendant, I refer by way of example to one from whose home has been taken large quantities of contraband, consisting of narcotics or other commodities, the very possession of which constitutes a serious violation of the law. The above-mentioned result, however, is the inevitable consequence of the

application of the federal exclusionary rule in those cases in which it may be ultimately determined that a search or seizure has been made illegally, either because of the absence of a search warrant or because of some technical defect in the affidavit upon which the warrant was based."

Both as a lawyer and a peace officer, it is my solemn duty to observe and respect constitutional guarantees and I will never be consciously guilty of advocating the flaunting of constitutional safeguards. It is my contention, however, that many searches and seizures branded as "unreasonable" by the courts are in fact reasonable under attendant circumstances and do not violate the purpose and intent of the Fourth Amendment of the United States Consitution. It is further urged that the true unreasonableness of the situation lies in the insurmountable handicaps placed upon the police.

In People v. Cahan the court made no attempt to define the areas in which a police officer might properly search for and seize evidence. In fact the confusion created by the decision was further magnified by the following language appearing in the majority opinion, "We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure. The validity of this contention need not be considered now. Even if it is assumed that it is meritorious, it does not follow that the exclusionary rule should be rejected. In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless

refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them." In the vast majority of cases the machinery of law enforcement is activated by the affirmative exercise of the powers and duties of a police officer. Yet the lowly police officer is told, in effect, that his actions will be justified or condemned in a piecemeal fashion as the facts of each particular case come before a high court of this state. It is my contention that this is an unfair burden to place upon those whose sole objective is the protection of the people against the vast predatory criminal army that exists in this country today. At this point it might be well to remember that the police officer is civilly liable for any tortious act he may commit in the performance of his duties while the courts and prosecutors have been granted immunity by judicial decree.

Since the Cahan case we have watched with interest the decisions of our Supreme Court dealing with the exclusionary rule. It now appears that the Court will approve the introduction of evidence seized without a warrant only when the officer had probable cause to effect an arrest and that whether the search is conducted before or after the arrest is immaterial. The question of what constitutes probable cause is a question of fact to be determined in retrospect and does not necessarily depend upon the state of mind of the officer at the time of the search and/or arrest. Authority to search the person is apparently limited to the individual for which there is probable cause to

subject to arrest and does not include companions that may be with him. In a recent local case, an officer observed a speeding motorist. Upon being overtaken, the motorist stopped his vehicle at the curb. The officer observed two male passengers and a typewriter in the rear seat of the vehicle. He inquired as to the ownership of the typewriter and ownership was claimed by one of the passengers. This person was subjected to search and a quantity of heroin was taken from his person. It was later determined that the typewriter had been stolen in Bakersfield and was the subject of an all points bulletin. At the preliminary hearing the evidence was excluded and the charges dismissed. The court concluded that, while the officer was justified in arresting the motorist for speeding, he had no probable cause to believe the passengers had committed a criminal offense and therefore the search of the defendant was unreasonable. This premise seems to have been sustained by our Supreme Court in its decision in the case of People v. Charles A. Simon handed down November 29, 1955. In this case a San Diego police officer observed two young men enter and leave a warehouse district about 10:40 P.M. The defendant's companion, a minor, was found to be in possession of alcoholic liquor, and the officer then proceeded to search the defendant and took from his person a marijuana cigarette. The court held this search to be unreasonable on the basis that the officer did not have probable cause for the arrest at the time the search was conducted. In the opinion in this case the court made the following observation, "Even if it was conceded that in some circumstances an officer making such an inquiry might be justified in running his hands

over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be justified." This statement leads me to inquire as to the proper course of action for the officer to pursue in the event a concealed firearm were found on the person searched and for which he had no permit to lawfully carry the weapon. No successful prosecution would lie if the officer lacked probable cause to make an arrest at the time the search was conducted. Could the officer seize the weapon if it was the personal property of the person searched? Sometimes I wonder if we are not launching into a sea of hypothetical abstracts. It appears to many of us in the law enforcement field that our ability to prevent the commission of crimes has been greatly diminished. The actual commission of a serious criminal offense will not justify affirmative police action until such time as the police have armed themselves with sufficient information to constitute "probable cause" for an actual arrest.

In contradistinction to the San Diego case, I invite your attention to a recent local incident wherein an alert officer effected the arrest of the suspects shortly after an armed robbery had been committed. On Monday, December 5, 1955 while on routine patrol, an officer of this department observed two men in an automobile being operated on Wilshire Boulevard. The general appearance of the men and the car, and the slight bend in the license plate aroused the officer's curiosity. After causing the car to be halted he searched the vehicle and recovered two toy guns and the loot of an $18,000 robbery that had occurred about four minutes before.

The officer's actions in this case were roundly applauded by a grateful public. In retrospect would this case stand the test of "probable cause". The officer was unaware of the robbery until after the apprehension of the suspects. True the license plate was bent but does probable cause depend upon the degree of the bend? A similar situation is found in the recent decision handed down by our Supreme Court in the case of People v. Beverly Michael. The officer contended that they were voluntarily admitted to the premises and the evidence was voluntarily handed to them. The defense contended that the presence of four officers constituted such a show of force that the admission to the premises and the surrender of the evidence were involuntary. In its opinion the dilemma of the police is highlighted when the court said "--the cases that have determined this question under varying factual circumstances are difficult if not impossible to reconcile--". Also in its opinion the court stated, "We are not unmindful of the fact that the appearance of four officers at the door may be a disturbing experience, and that a request to enter made to a distraught or timid woman might under certain circumstances carry with it an implied assertion of authority that the occupant should not be expected to resist." From this statement it might appear that the number of officers seeking voluntary admittance to premises in criminal investigations should be gauged by the timidity of the occupant if such could be determined in advance.

Tremendous strides have been made from within the field of law enforcement to upgrade the police service. One of the

greatest hurdles is the tendency of many courts to separate the government, the people and the police into three separate alien camps. Lincoln referred to a government "of the people, for the people and by the people." The police are the servants of the people, and it is contrary to public welfare to so hamper the police in the conscientious performance of their duties, through the gratuitous imposition of the exclusionary rule, that the question of the conduct of the officer in obtaining evidence is paramount to the question of the guilt of the defendant. Quoting from page nine of the Cahan decision, " 'the federal exclusionary rule,' in the words of Mr. Justice Black, 'is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate.'"

It is conceivable that the imposition of the exclusionary rule has rendered the people powerless to adequately protect themselves against the criminal army. According to the statistics released by the Federal Bureau of Investigation, crime increased in the United States during the period 1950 - 1954 at four times the rate of the population increase. Even the proponents of the rule will not deny that its application will result in the freeing of some criminals that would otherwise be punished. In this connection I believe the time has come to take a hard look at the results of the Cahan decision upon the crime picture in this city.

During the first quarter of 1955, selected major felony offenses (those offenses that constitute the most accurate crime barometer) decreased fifteen percent over the same period in 1954.

With the advent of the imposition of the exclusionary rule on April 27, 1955, there was a progressive diminishment in the crime decrease with the result that at the end of the year the decrease over 1954 was less than four percent. This situation cannot be blamed upon any lack of diligence upon the part of the police for the total arrests during 1955 increased more than twelve percent over 1954. Your attention is invited to appendix A of this report entitled "Crime Trends". You will note that the Los Angeles crime experience during the first four months of 1955 precisely followed the five-year-average and was appreciably below the 1954 experience. Following the Cahan decision, there was a departure from the trend of an accelerating nature with such a skyrocketing effect that December 1955 reflected the worst crime experience in the history of Los Angeles. In attempting to determine cause, it must be concluded that the greatest single factor representing a change in the current situation was the imposition of the exclusionary rule at the close of April 1955. As the criminal army became familiar with the new safeguards provided to them, the acceleration in crime was an inevitable result.

A projection of the trend existing at the time of the Cahan decision, compared with the actual experience during the period from May 1, 1955 to the end of the year, reveals the following number of crimes in Part I Property Offenses committed that would not have been committed if the trend had remained constant:

Offense	Number	% of Increase Above Trend
Robbery	481	31.7
Burglary	1403	13.9
Larceny	2580	11.5
Auto Theft	1250	30.9
Total -	5714	15.0

It is entirely probable that these 5,714 crimes would not have occurred if the underworld had not been aided by the exclusionary rule.

The trends in the prison population of this state bear further evidence of a changing condition that can be attributed to the handicaps placed upon law enforcement by the imposition of the exclusionary rule. Since 1944 the California prison population has steadily increased with the exception of one or two months during the Korean conflict. The monthly increase has ranged from 8-10 to 200. The population of the state prison system reached an all time high in March 1955 with a count of 15,668. It was estimated by prison officials that the count at the end of 1955 would total about 16,020. The trend reversed itself, and at the close of 1955 the population count was about 15,230. Thus, there are more than 790 fewer persons in our state prisons today than were anticipated by the prison authorities. Who can refute the fact that the change in the rules of evidence in criminal cases in California may have resulted in more than 790 criminals at large to prey upon the people of this state that would otherwise be serving sentences in a state prison.

A further evidence of the severe blow dealt to efficient law enforcement under the exclusionary rule is contained in Appendix B to this report. The average monthly arrests for certain offenses

during 1955, before and after the Cahan decision, are set forth in the table. In order to refute the spurious claim that these are seasonal changes, the identical comparisons for the year 1954 are enumerated. The most significant figure in this table is in the field of narcotic arrests. During 1954 the comparative periods reflected a 15.7% increase in such arrests, while a 4.5% decrease followed the Cahan decision. When it is considered that many authorities in the field of law enforcement estimate that narcotics play a part in fifty percent of all major criminal offenses the significance of this decrease in narcotic arrests is, in itself, an indictment of the exclusionary rule.

Another great state of this country, as a result of an unhappy experience with the exclusionary rule, took affirmative action to modify it in a manner that might well be emulated by the Legislature of California. By popular vote, first in 1935, and again in 1952, the people of the State of Michigan amended Section 10 of their constitution to prohibit the barring of evidence in criminal proceedings when the evidence consists of dangerous weapons or narcotics seized by a peace officer outside the curtilage of any dwelling house in the state. The text of this section in its present form is as follows:

> "SEARCHES AND SEIZURE; drugs, weapons, admissibility in evidence. SEC. 10. The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause,

supported by oath or affirmation: Provided, however, that the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, (any narcotic drug or drugs,) any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state. HISTORY.

As amended in 1935, ratified at general November election, 1936; 1952, ratified at general election of November 4, 1952; proposed by joint resolution of 1952 Legislature."

If the exclusionary rule "is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate" as stated by Mr. Justice Black, then does it not necessarily follow that the Supreme Court of California created a judicial rule of evidence in the Cahan decision which the California Legislature might negate. The creation of rules of evidence is the historic responsibility of the legislative branch of government and some believe that the usurpation of this power by the courts is an intrusion upon the legislative function. There appears in Vol. 45, No. 6 - March-April 1955 edition of "The Journal of Criminal Law, Criminology and Police Science",

published for Northwestern University School of Law, an article by John L. Flynn, Editor, entitled "The State Exclusionary Rule As a Deterrent Against Unreasonable Search and Seizure". In this article the following statement appears, "Justification for the rule demands a choice between individual and public security. Some difficulty in law enforcement is the price which must admittedly be paid for the right of privacy. To justify its continuance and extension, therefore, the rule must be shown to be more beneficial to the individual than it is harmful to society."

The statistical history of crime in Los Angeles since the imposition of the exclusionary rule clearly demonstrates that it is more harmful to society than it is beneficial to the individual. Therefore, the continuation of the rule is unjustified and immediate legislative remedy is in order. While the complete abolition of the rule through legislative action is justified it is my considered opinion that the least the Legislature of the State of California should do is to enact the rule of law contained in Section 10 of the Constitution of the State of Michigan.

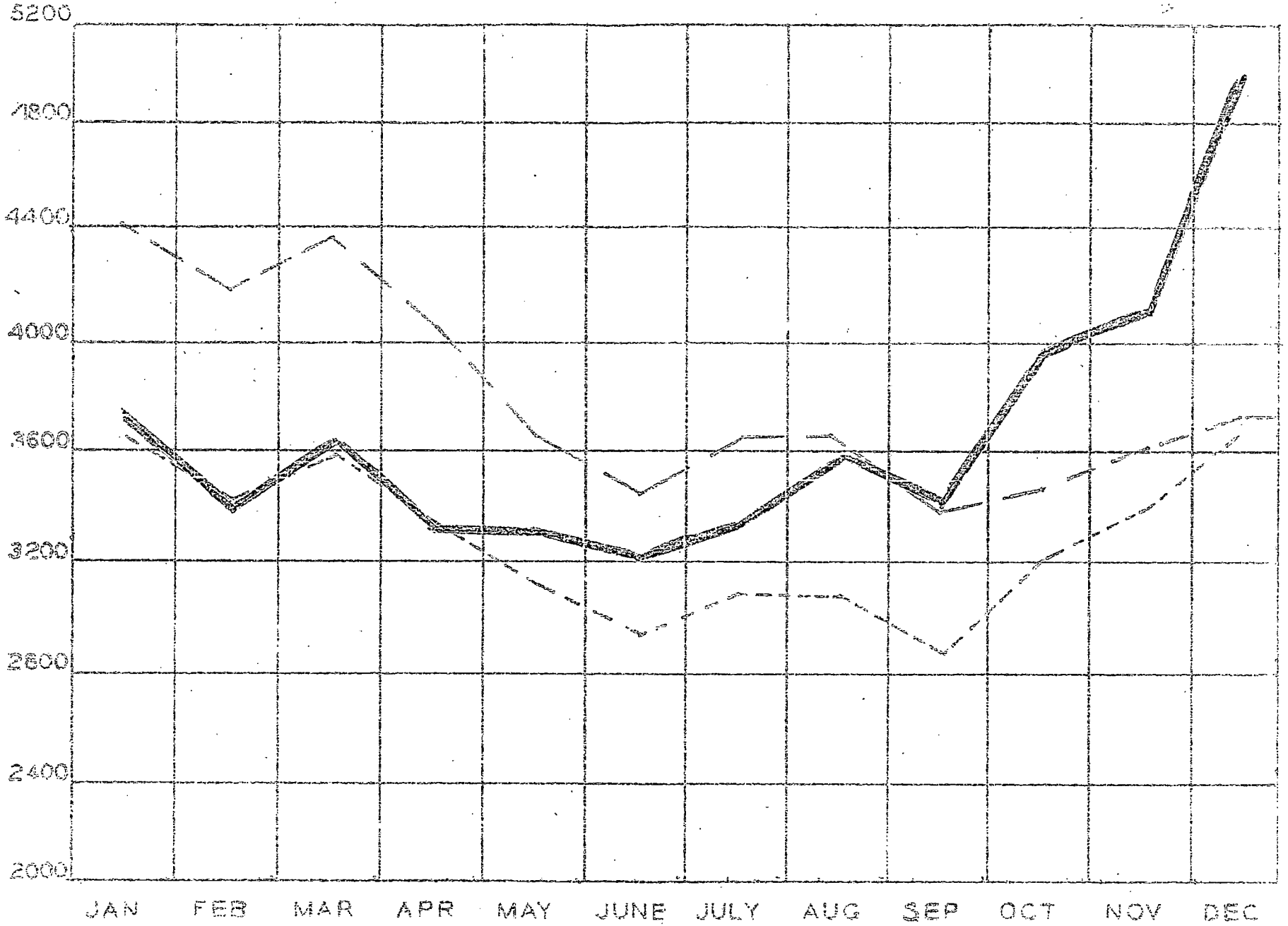
LAPD

* CRIME TRENDS

1954 ——— ——— ———

1955 ═══════

5 YR AV – – – – – – –



* ROBBERY, BURGLARY, AUTO THEFT, BURGLARY THEFT FROM AUTO

APPENDIX "A"

Issued by:
Statistic's Unit
Planning & Research Div.
Los Angeles Police Dept.
January 6, 1956

APPENDIX "B"

Average Monthly Arrests for Specified Charges

Charge	1955 Average Month January-April	1955 Average Month May - Dec.	1955 % Increase or Decrease	1954 Average Month January-April	1954 Average Month May - Dec.	1954 % Increase or Decrease
Bookmaking	70	55	-21.4	48	58	+20.8
Gambling	528	443	-16.1	458	470	+2.6
Prostitution	295	291	-1.4	239	282	+21.9
Weapons	64	60	-6.3	74	69	-6.8
Narcotics	403	385	-4.5	325	376	+15.7
Robbery	368	293	-20.4	421	312	-25.9
Burglary	541	483	-10.7	549	483	-12.0
Felonies	2388	2193	-8.2	2358	2177	-7.7

5/19/55
Req. #11342

By Mr. Smith

HOUSE RESOLUTION NO. 184

Relative to directing the Assembly Interim Committee On Judiciary to undertake a study of the subject of illegal searches and seizures.

WHEREAS, In the case of People v. Cahan, 44 A.C. 461, the Supreme Court of California handed down one of its most important decisions in many years, adopting a judicial rule of evidence excluding illegally obtained evidence from at least criminal trials, leaving for the future the development of "workable rules" for application of the general exclusionary principle; and

WHEREAS, There has long been a need, made imperative by this decision, for a thorough study by the Legislature of the subject of illegal searches and seizures and the admission or exclusion of evidence obtained thereby, in order that the Legislature may, on the basis of established facts, exercise its authority in this field; now, therefore, be it

Resolved by the Assembly of the State of California, That the Assembly Interim Committee on Judiciary, created at this session, is hereby authorized and directed to ascertain, study, and analyze all facts relating to illegal searches and seizures, including but not limited to

the prevalence thereof, the extent, if any, to which persons guilty of crime or innocent thereof are subjected to such searches and seizures, the desirability or undesirability of enacting legislation aimed at deterring commission of illegal searches and seizures, and the form any such legislation should take, and the desirability or undesirability of retaining, overruling, modifying, or implementing the exclusionary rule announced in the Cahan case, including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws and constitutional provisions in any way bearing upon or relating to the subject of this resolution and to report thereon to the Assembly at the 1957 Regular Session of the Legislature, including in the report its recommendations for appropriate legislation.

LAW OFFICE
400 SECURITY TITLE INSURANCE BLDG.
530 WEST SIXTH STREET
LOS ANGELES 14, CALIFORNIA
MADISON 6-4457

SACRAMENTO ADDRESS
STATE CAPITOL
ZONE 14

COMMITTEES
FINANCE AND INSURANCE
JUDICIARY
VICE CHAIRMAN
LEGISLATIVE REPRESENTATION
PUBLIC HEALTH

Assembly
California Legislature

H. ALLEN SMITH
MEMBER OF ASSEMBLY, FORTY-THIRD DISTRICT

December 15, 1955

I N V I T A T I O N

HEARING OF THE ASSEMBLY JUDICIARY SUBCOMMITTEE ON ILLEGAL SEARCHES, SEIZURES AND THE LAWS OF ARREST.

TO: Each of the Following Listed Individuals

PLACE: Main Auditorium, Los Angeles Police Administration Building, 150 North Los Angeles Street, Los Angeles, California.

DATE: January 11th and 12th, 1956

TIME: 10:00 A.M.

As Chairman of the Assembly Judiciary Committee, as well as the Subcommittee to study the above subject, I am planning to hold a committee hearing as set forth above. Each of the individuals listed below, to whom a copy of this is being sent, is hereby invited and requested to attend these hearings and present such information and evidence as he desires particularly relating to illegal searches and seizures and the laws of arrest as brought about by the Cahan decision, whether or not the exclusionary rule should be waived so far as it applies to narcotic offenses, and whether or not any remedial legislation is necessary, particularly as it might relate to requesting the Governor to open the call at the March, 1956, session of the legislature.

You may have any other individuals represent you or bring other persons from your department and you may extend invitations to any other individuals you feel wish to appear before the committee. Documentary evidence and, if possible, prepared statements will be appreciated.

Please advise the writer at his Los Angeles office if you will be present and if there is any particular time you wish to appear and approximately how much time you would like for your presentation.

In view of the holiday season and the short time before the hearings, please accept my apologies for presenting this invitation in this manner rather than by personal letters. It was my feeling, however, that you would like to know who is being invited to these hearings.

H. ALLEN SMITH

Attorney General Edmund G. Pat Brown
Chief, Bureau of Narcotic Enforcement, Walter R. Creighton
District Attorneys: S. Ernest Roll - Los Angeles County
Bradford M. Crittenden - San Joaquin County
J. F. Coakley - Alameda County
J. D. Keller - San Diego County
Thomas C. Lynch - San Francisco County
Superior Court Judges: Charles W. Fricke
David Coleman
Leroy Dawson
Philip H. Richards
Mildred L. Lillie
Stanley Mosk
L. N. Turrentine
Milton D. Sapiro
Municipal Court Judges: Walter H. Odemar
Vernon Hunt
Morton L. Barker
John F. Iaso
Sheriff Eugene W. Biscailuz
Chiefs of Police: William H. Parker - Los Angeles
Carl Eggers - Glendale
Rex Andrews - Burbank
Clarence H. Morris - Pasadena
George M. Healy - San Francisco
Edward J. Allen - Santa Ana
Horace V. Grayson - Bakersfield
James V. Hicks - Sacramento
City Attorney Roger Arnebergh
County Counsel Hal Kennedy
Citizens Advisory Committee - Bruno Newman

Interim Comm

MEMORANDUM

TO: J. F. COAKLEY

FROM: JAY R. MARTIN

SUBJECT: PROPOSAL TO LEGALIZE INTERCEPTION OF COMMUNICATIONS BY LAW ENFORCEMENT OFFICERS

DATE: NOVEMBER 30, 1954.

I - Proposed New Legislation

> "Why all this tenderness for the law-breaker? In a period when our people are cursed with a recklessness of law, why hamper the law officers? Why expend our sympathies on the offender? It is a singular phenomenon, which will some day puzzle the historian."
>
> 8 Wigmore evidence, Sec. 2184b (3d Ed.1940)

Proposed for the 1955 session of the California Legislature is a new section 640.1 of the Penal Code. This section is to be added to provide that a Superior Court judge may, by an ex parte order, authorize the detection or interception of phone or wire messages for a limited period of time not to exceed six months. This order as proposed must be based upon an application by the District Attorney, supported by the affidavit of the District Attorney, Sheriff or Police Chief, stating the following:

(1) The identity of the phone or telegraph wire involved.

(2) That there is reasonable ground to believe that evidence of a felony may be thus obtained.

(3) That any evidence thus obtained will be used only in the prosecution of a criminal cause.

Further, any Justice of either the Supreme Court or the District Court of Appeal is empowered to make a similar order based on the application and affidavit of the Attorney General personally. Such documents are to be kept in a secret file by the court clerk. In addition, the copies of these documents retained by the District Attorney or Attorney General shall be considered confidential and not opened to inspection and that any information

obtained by the interception is to be reported to the District Attorney or Attorney General. Evidence thus obtained is expressly made admissible in any criminal case but is not to be disclosed in civil proceedings or for any other purpose.

The basic language of this proposal is taken from Section 813-A of the New York Code of Criminal Procedure, enacted in that state in 1942. However, this section in the New York Code does not have the following safeguards which the present proposal offers:

(1) The New York statute authorizes the supporting affidavit to be made by any police officer above the rank of sergeant; (2) There are no expressed provisions requiring secrecy; (3) Nor any requirement that the information thus obtained be not divulged; and (4) The New York statute is not limited to felonies alone but includes misdemeanors also.

The following is a copy of Section 813-A of the New York Code of Criminal Procedure:

> Sec. 813-A Ex Parte Order for Interception
>
> An ex parte order for the interception of telegraphic or telephonic communications may be issued by any justice of the Supreme Court or any judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney general, or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone lines or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than six months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based shall be delivered to and retained by the applicant as authority for intercepting or directing the interception of the telegraphic or

telephonic communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing same.

Added L. 1942, c 924, eff May 23, 1942

McKinney's Consolidated Laws of New York Bk 66, Part 2, page 703.

The New York statute since its enactment in 1942 has operated with a minimum amount of difficulty; as in any controversial piece of legislation, there have been criticisms or complaints. The complaints and criticisms that do exist, however, have been solved in the main by additional safeguards placed in the California proposal, namely, the restriction to felonies and the restriction of those procuring such an ex parte order from the court to District Attorneys, Chiefs of Police, Sheriffs and Attorneys General.

II - Historical Data

The landmark federal case on wire tapping is Olmstead v. U.S., 277 U.S. 438, (1928) (conspiracy to violate the National Prohibition Act). In this leading wire tapping decision the Supreme Court held that wire tapping is not an unconstitutional search and seizure. The Fourth Amendment, said the Court, protects only "tangible material effects" and "actual physical invasion"; therefore it refused to apply the amendment to "projected voices".

After this landmark ruling the legal status of wire tapping was easily defined. It was neither unconstitutional nor a federal crime and evidence obtained by intercepting telephone conversations was admissible in Federal courts, regardless of State laws which might make wire tapping an offense.

Subsequent to this decision the Federal Communications Act was passed which prohibited the use of this evidence in federal courts. Sec. 605 of the Federal Communications Act, 48 Stat. 1103 (1934) 47 USC Sec. 605, (1946).

In the following case involving the Federal Communications Act the Supreme Court held in Goldstein v. U. S., 316 U. S. 114 (1942) (mail fraud), in affirming a conviction, that one not a party to a tapped conversation has no standing to object to this use by the government to obtain testimony. Assertion of the right, reasoned the court, is a personal matter like assertion of the constitutional right to protection against unreasonable searches or seizures or self-inerimination. Therefore, a third person could not complain of the use of evidence obtained through wire tapping in a federal court against him if he was not a party to the tapped conversation.

Following the Goldstein decision was its companion case, Goldman v. U. S., 316 U. S. 129 (1942) (conspiracy to violate the Bankruptcy Act). Here the court held that a recording of the defendant's conversation into a telephone receiver obtained by federal officers with the aid of a sensitive listening device placed on the wall of an adjoining room, violated neither Section 605 supra, nor the Fourth Amendment. The majority reasoned that here there is neither "a communication" nor "an interception" within the meaning of the Act, Page 133.

Wigmore points out in Vol. 8, Section 2184B, Page 52, of his "Treatise on Evidence", 3rd Edition, that under Section 700, Title 39, U.S. Code (1926), the Postmaster-General may authorize a postal inspection to open, search, etc., mailable matter "whenever such officer has reason to believe that mailable matter transported contrary to law may therein be found." Thus Wigmore points out there is precedent for authorizing the interception of messages. In addition, Professor Wigmore, as indicated by the quotation at the beginning of this memorandum, not only approves of the use of wire tapping by law enforcement officers, but can find no reasonable explanation for the lack of such use at the present time. In his own words in the aforementioned work he states:

"It is a singular phenomenon, which will some day puzzle the historian."

With respect to the constitutionality of such a measure it may be pointed out here that the validity of the New York statute referred to above was upheld by the New York Court of Appeals in Harlem Check etc., Co. v. Bell, 68 N.E. (2d) 954 (1946). In addition, the Supreme Court declared in 1928, the case of Olmstead v. U. S., supra, that any alleged right infringed upon by the use of wire tapping, i. e., the right of privacy, is not within the Fourth Amendment of the Constitution and, therefore, is not a violation of the United States Constitution.

The feeling of honest, earnest and efficient law enforcement officers and those members of the citizenry who are aware of the problems that confront these officers is illustrated by the following excerpt from an article published in the Saturday Evening Post, dated September 8, 1951, written by Edson Shamhart, a retired Deputy Commissioner of the U. S. Customs Service, entitled "Smugglers Were My Quarry".

> "I would like to submit . . . that those ultraliberal judges whose hearts bleed for the poor benighted criminal should let their hearts bleed occasionally for the poor benighted citizen whose rights have been ignored by the criminal and for the law enforcement officers who have been elected or appointed by the people for their protection."

In urging a grant of federal wire tapping authority in 1951 the Senate Crime Investigating Committee noted:

> "Several states, notably New York, have laws which permit the use of wire tapping pursuant to court order and subject to reasonable safeguards. These laws work satisfactorily and without objection on the part of the law abiding citizens."
>
> Senate Report No. 725, 82d Cong. 1st Session, 5, (1951)

New York's wire tapping legislation has recently been augmented by Sec. 552a of the Penal Code of the State of New York which makes it a misdemeanor to possess a wire tapping device "under circumstances evincing an intent to unlawfully use or employ, or

or allow the same to be used . . . for wire tapping." This was adopted in April, 1949, as the result of the exposure of a plot by private persons to tap the telephone of Mayor William O'Dwyer and several other city officials.

The following is a list of uses of wire tapping devices in the State of New York:

1. Wire tapping was used to monitor the telephones of a known racketeer to learn who called him and for what purpose.

2. Wire tapping was essential in obtaining evidence against individuals such as call girls and bookmakers who transact their illegal business by telephone.

3. Wire tapping has provided the critical proof of the conspiratorial nature of a criminal act, e. g., when a group of criminals solicits by telephone hundreds of contributions for a nonexistent, ever-changing charity, recordings will be evidence of the inconsistent statements knowingly made and will ascertain potential defrauded complainants.

4. Wire tapping recordings have preserved the essential part of a conversation in which a criminal act is planned or carried out but where the witness conversing is uneducated, frightened, or in any way unable or unwilling to describe accurately the telephone transaction which constitutes the gist of the offense.

5. Wire tapping records have served to convince defendants that the police know of their guilt and that they would be wise to turn State's evidence, confessing and naming confederates.

6. Wire tapping has been useful in kidnapping cases where the kidnapper caused the victim to arrange for

ransom. His voice can be recorded and the record then played to hundreds of police and other persons who may recognize vocal idiosyncracies and thus identify the kidnapper.

III - General Policy Considerations

Those who favor wire tapping do so in the interests of the nation and the community in which they work. N.B. 8 Wigmore Evidence, Sec. 2184B (3rd Ed. 1940); hearings before Subcomittee No. 1 of the Committee on the Judiciary on H.R. 2266 and H.R.3099, 77th Cong., 1st Session, 112 (1941) (testimony of J.Edgar Hoover); id., at 257 (letter from President Roosevelt to Rept. Eliot); 86 Cong. Rec. App. 1471 (1940) (statement of Attorney General Jackson). They advocate the use of wire tapping for the detection of reprehensible offenses such as kidnapping and extortion, as well as for sabotage, espionage and similar crimes against national security. Some advocate its use in connection with lesser crimes such as misdemeanor offenses. It isargued that criminals utilize science to the fullest in their schemes, therefore, a law enforcement officer should be placed at least upon equal footing with the criminal.

Those who oppose wire tapping do so by arguing that the citizens' right of privacy issacred and should not be invaded. These persons have confused the right of privacy with those granted by the U. S. Constitution. By continuous repetition of this phrase "the right of privacy" those who oppose wire tapping in its limited form by law enforcement officers with adequate safeguards, have associated this phrase and spoken of it as being synonymous with the rights guaranteed by the Constitution of the U. S., e. g. freedom of speech, religion and search and seizure, etc. These persons overlook the landmark decision in wire tapping of Olmstead v. U.S., supra, which clearly and succinctly points out that there is no such right guaranteed in the Fourth Amendment of the U.S.Constitution.

These opponents also conveniently overlook that portion of the U. S. Constitution which provides the State and Federal police powers, and that these powers have been used repeatedly to pass regulatory legislation in reference to law enforcement.

In order to round out the background information on this subject the case of Melvin v. Reid, 112 Cal.App. 285 (1931) must be pointed out. This was the first California case which discussed the subject of "the right of privacy". Here it must be noted we have a civil case for a suit for damages. The plaintiff had been engaged in prostitution before her marriage and reformation. She had also been a party to a murder trial in which she was acquitted. The defendant produced a moving picture showing the incidents and life of the plaintiff, and also used her full maiden name in the picture. In the absence of any other law on the subject in California, the Court turned to the state constitution, Section 1 of Article 1. In granting a judgment to the plaintiff the court held that the aforementioned section protected a citizen of the State of California from "unreasonable invasions of their right to privacy". It must be noted, however, that not only is this a civil case, but more important the appellate court limited its holding to unreasonable invasions. The facts of the Reid case supra, can in no way be compared with facts which might arise in a wire tapping situation if the provisions of the proposed section 640.1 are enacted. It is submitted by this writer that all the cases involving the invasion of the right to privacy for the most part deal in factual situations either similar to the Reid case supra or involving the unauthorized use of photographs and names for a monetary purpose. It is submitted that Section 640.1 is not a violation of our state constitution, and as indicated herein not a violation of the U.S.Constitution. Weighing the individual's right to privacy against the need for effective, efficient and complete detection of criminals by our law enforcement groups, we find ourselves with the type of conflict in

values which characterizes many areas of our law and social structure today. Invariably, these conflicts are resolved through a comparison of the exigencies of our times in demanding adequate safety and protection for society as a whole with the personal rights or comforts of the individual. Those who oppose a well regulated wire tapping law in effect insist that the overwhelming necessity for effective law enforcement and the protection of the citizens of our communities must succumb to the individual criminal's personal privilege not to have his criminal conversations tapped.

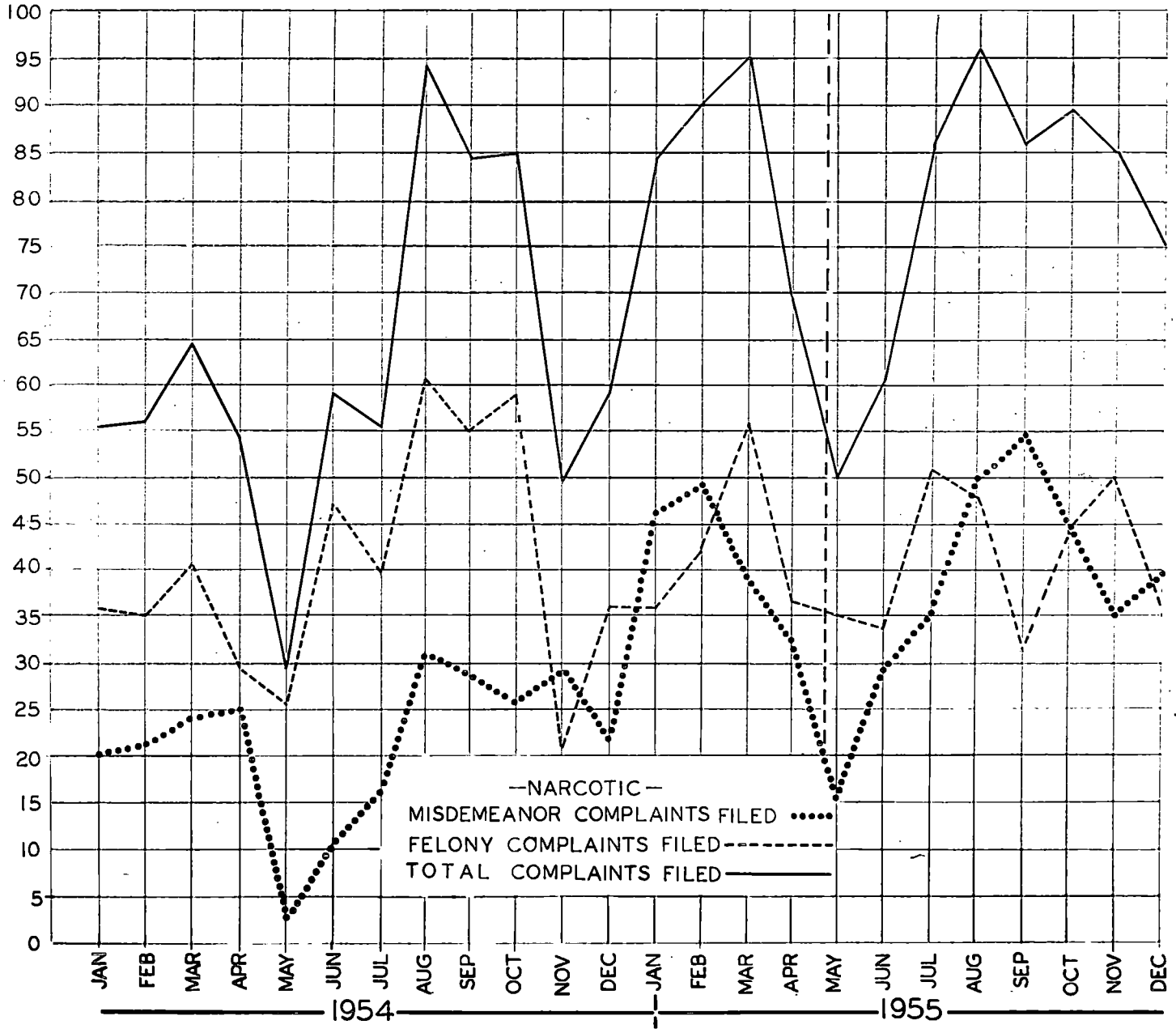
Mr. Allen F. Estin in his extensive article entitled "The Wire Tapping Problem", 52 Columbia Law Review 125, February, 1952, while not wholeheartedly in favor of wire tapping per se, has admitted that there is a necessity for well planned and regulated legislation on this subject. It is submitted that the proposed California law on a state level includes almost all of the recommendations of Mr. Westin with respect to the safeguarding of individual rights and still providing protection for society.

Respectfully submitted,

Jay R. Martin

SHERIFF S DEPARTMENT

Los Angeles County



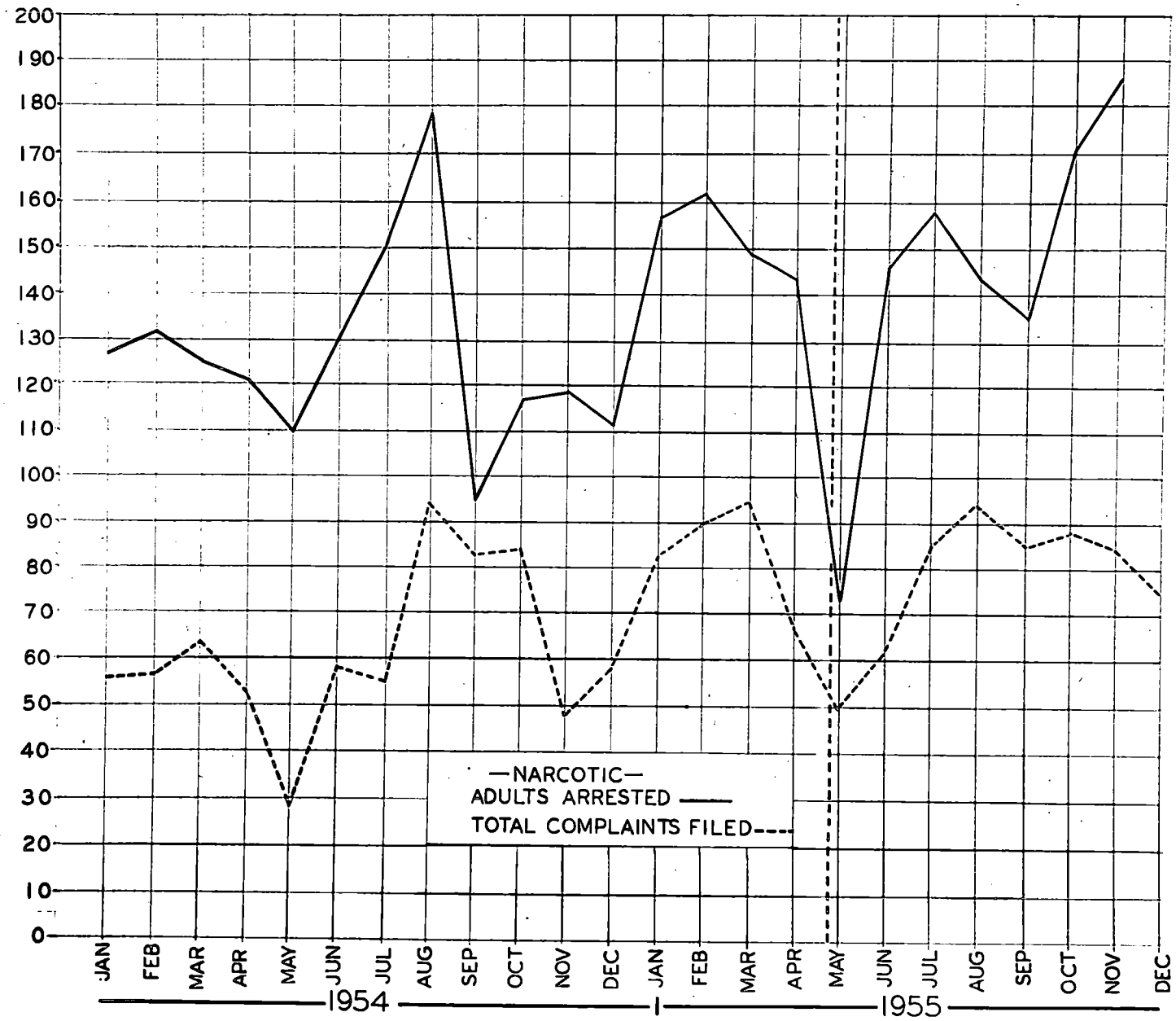
NARCOTICS

1954	TOTAL COMPLAINTS	MISDEMEANOR COMPLAINTS	FELONY COMPLAINTS
JAN.	56	20	36
FEB.	57	22	35
MAR.	64	24	40
APR.	54	25	29
MAY	29	3	26
JUN.	58	10	48
JUL.	56	16	40
AUG.	94	32	62
SEP.	84	29	55
OCT.	85	27	58
NOV.	50	28	22
DEC.	59	23	36
TOTAL --	746	259	487

1955	TOTAL COMPLAINTS	MISDEMEANOR COMPLAINTS	FELONY COMPLAINTS
JAN.	84	47	37
FEB.	90	47	43
MAR.	95	39	56
APR.	70	33	37
MAY	50	15	35
JUN.	62	28	34
JUL.	87	35	52
AUG.	96	49	47
SEP.	87	54	33
OCT.	89	45	44
NOV.	85	35	50
DEC.	75	38	37
TOTAL --	970	465	505

SHERIFF S DEPARTMENT

Los Angeles County



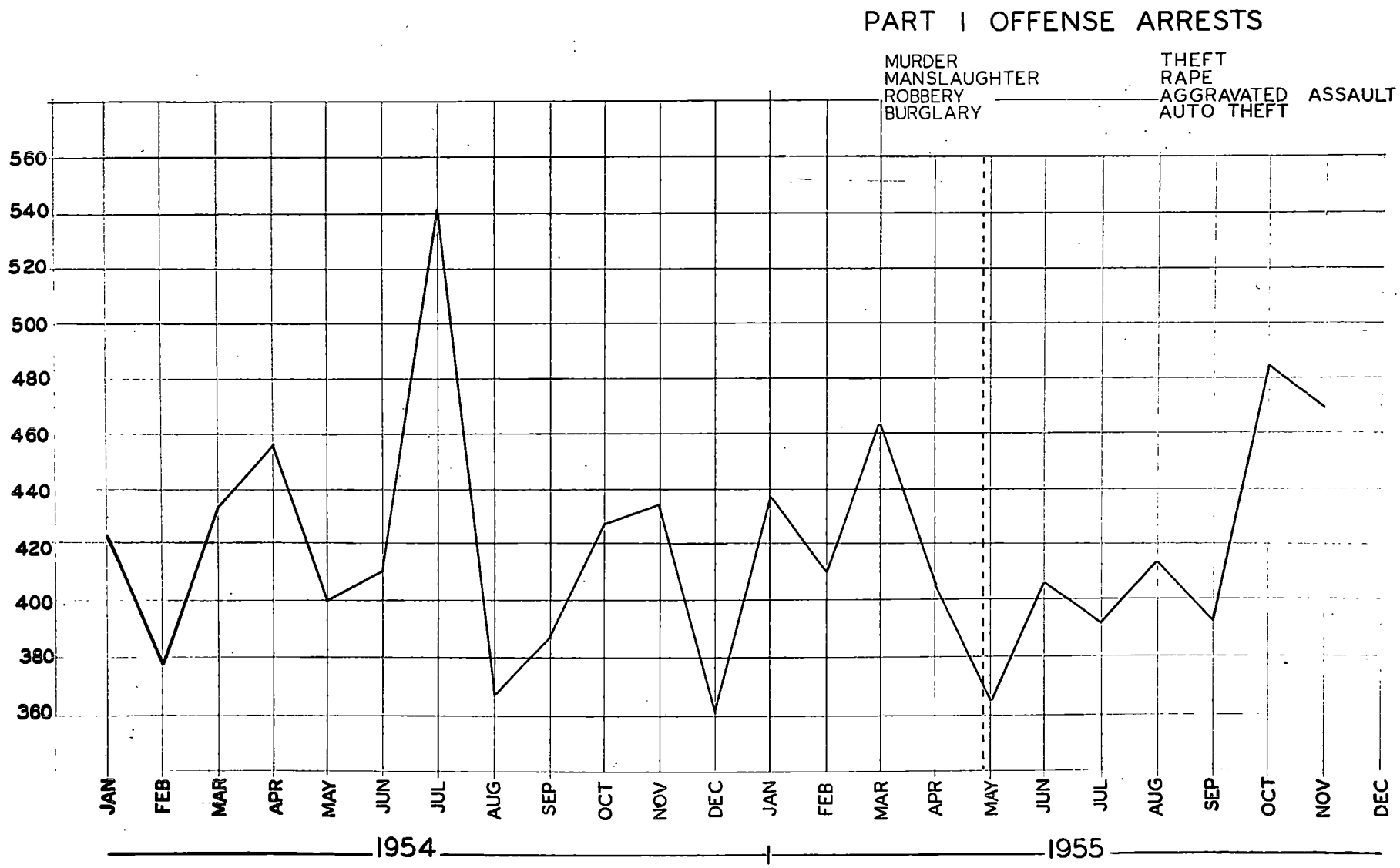
NARCOTICS

1954	ADULTS ARRESTED	TOTAL COMPLAINTS
JAN.	127	56
FEB.	131	57
MAR.	126	64
APR.	122	54
MAY	109	29
JUN.	129	58
JUL.	149	56
AUG.	178	94
SEP.	95	84
OCT.	117	85
NOV.	119	50
DEC.	111	59
TOTAL --	1,513	746

1955	ADULTS ARRESTED	TOTAL COMPLAINTS
JAN.	158	84
FEB.	161	90
MAR.	148	95
APR.	143	70
MAY	74	50
JUN.	145	62
JUL.	158	87
AUG.	144	96
SEP.	134	87
OCT.	171	89
NOV.	186	85
DEC.	--	75
TOTAL --	1,622	970

SHERIFF S DEPARTMENT

Los Angeles County

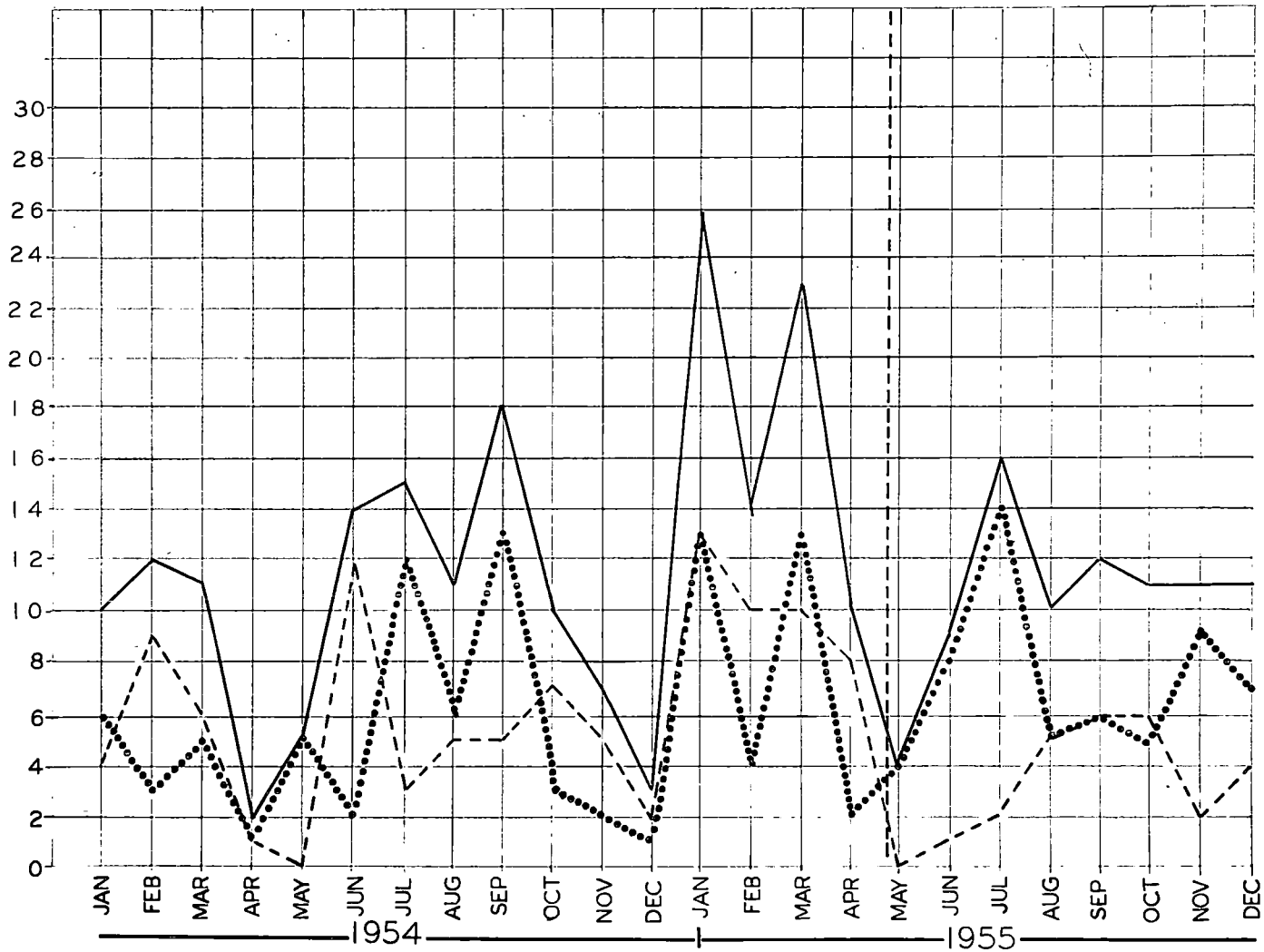


PART ONE OFFENSE ARRESTS.

1954	TOTAL ARRESTS	1955	TOTAL ARRESTS
JAN.	424	JAN.	439
FEB.	378	FEB.	411
MAR.	434	MAR.	464
APR.	456	APR.	406
MAY	401	MAY	365
JUN.	411	JUN.	407
JUL.	541	JUL.	390
AUG.	367	AUG.	414
SEP.	387	SEP.	373
OCT.	428	OCT.	485
NOV.	435	NOV.	469
DEC.	361	DEC.	—
TOTAL —	5,023		4,623

SHERIFF S DEPARTMENT
Los Angeles County

—BOOKMAKING—
HAND BOOK ARRESTS•••••
PHONE SPOT ARRESTS– – – – –
TOTAL ARRESTS ———



BOOKMAKING

1954	PHONE SPOT ARRESTS	HAND BOOK ARRESTS	TOTAL ARRESTS
JAN.	4	6	10
FEB.	9	3	12
MAR.	6	5	11
APR.	1	1	2
MAY	-	5	5
JUN.	12	2	14
JUL.	3	12	15
AUG.	5	6	11
SEP.	5	13	18
OCT.	7	3	10
NOV.	5	2	7
DEC.	2	1	3
TOTAL --	59	59	118

1955	PHONE SPOT ARRESTS	HAND BOOK ARRESTS	TOTAL ARRESTS
JAN.	13	13	26
FEB.	10	4	14
MAR.	10	13	23
APR.	8	2	10
MAY	-	4	4
JUN.	1	8	9
JUL.	2	14	16
AUG.	5	5	10
SEP.	6	6	12
OCT.	6	5	11
NOV.	2	9	11
DEC.	4	7	11
TOTAL --	67	90	157

SHERIFF
LOS ANGELES COUNTY

NARCOTIC COMPLAINTS

1955	Number Requested	Number Issued	No. Denied a/c Cahan	No. Denied Other Reasons
May	52	50	-	2
June	72	62	-	10
July	97	87	-	10
August	110	96	1	13
September	90	87	1	2
October	96	89	2	5
November	91	85	2	4
December	75	75	-	5
Totals	683	631	6	51

BOOKMAKING COMPLAINTS

1955	Number Requested	Number Issued	No. Denied a/c Cahan	No. Denied Other Reasons
May	4	4	-	-
June	9	9	-	-
July	16	16	-	-
August	10	10	-	-
September	12	11	-	1
October	11	9	-	2
November	11	11	-	-
December	11	9	-	2
Totals	84	79	-	5

BOOKMOBILE CIRCULATION

Title	Number Requested	Number Issued	No. Overlaid w/o Order	No. Period Over Issued
[illegible]	44	44	-	-
Zero	9	9	-	-
Ally	16	16	-	-
August	30	28	-	-
September	12	11	-	1
October	14	9	-	-
November	11	11	-	-
December	12	9	-	1
Total	148	79	-	5

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

1220

(40)

W. P. MARSHALL, PRESIDENT

SYMBOLS

DL=Day Letter

NL=Night Letter

LT=Int'l Letter Telegram

VLT=Int'l Victory Ltr.

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

LA240 OD574

1956 JAN 19 PM 4 55

O RVA188 DL PD=RIVERSIDE CALIF 19 414PMP=

=H ALLEN SMITH CHAIRMAN JUDICIARY COMMITTEE=

=530 WEST 6TH ST LOSA=

RESOLUTION JANUARY 19 1956

¶ FIFTY-FIVE CHIEFS OF POLICE ZONE 6, UNANIMOUSLY PASSED THE FOLLOWING RESOLUTION TODAY.

¶ WHEREAS THE RECENT CALIFORNIA SUPREME COURT DICISIONS ON SEARCH AND SEIZURE HAVE SERIOUSLY HAMPERED LAW ENFORCEMENT OFFICERS IN THE CONTROL OF ALL TYPES OF CRIME:

¶ THEREFORE BE IT RESOLVED THAT HIS EXCELLENCY THE GOVERNOR OF THE STATE OF CALIFORNIA, INTRODUCE AND RECOMMEND THE PASSAGE OF A BILL AT THE FORTHCOMING SPECIAL SESSION OF THE LEGISLATURE RESTORING THE ADMISSIBILITY OF SO-CALLED "ILLEGALLY OBTAINED EVIDENCE " AT LEAST IN NARCOTIC CASES.

¶ BE IT FURTHER RESOLVED THAT IT IS VERY DESIRIOUS OF RESTORING THE ADMISSIBILITY OF SO-CALLED "ILLEGALLY OBTAINED EVIDENCE" IN ALL TYPES OF CRIMINAL CASES IF CRIME IS TO BE KEPT UNDER CONTROL IN CALIFORNIA BUT THAT IT IS MANDATORY TO RESTORE THIS RIGHT IN NARCOTIC CASES IF THE PRESENT INTOLERABLE SITUATION IS TO BE ALLEVIATED.

¶ BE IT FURTHER RESOLVED THAT COPIES OF THIS RESOLUTION BE FORWARDED TO HIS EXCELLENCY GOVERNOR KNIGHT AND THE HONORABLE H ALLEN SMITH.

=CHIEF J A BENNETT RIVERSIDE POLICE DEPARTMENT COMMITTEE FOR CHIEFS OF ZONE 6

CLASS OF SERVICE

This message unless d character is by the proper symbol

WESTERN UNION

TELEGRAM

W. P. MARSHALL, PRESIDENT

1201

SYMBOLS

DL=Day Letter

NL=Night Letter

LT=International Letter Telegram

The filing time shown in the date line on domestic telegrams is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

¶ CHIEF A E JANSEN SAN DIEGO POLICE DEPARTMENT
COMMITTEE FOR CHIEFS OF ZONE 6

¶ CHIEF WYATT D BRIGGS EL CENTRO POLICE DEPARTMENT
COMMITTEE FOR CHIEFS OF ZONE 6=

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

1220

W. P. MARSHALL, PRESIDENT

SYMBOLS

DL=Day Letter

NL=Night Letter

LT=Int'l Letter Telegram

VLT=Int'l Victory Ltr.

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

=LA116 OD381

O LLA217 LONG PD=WUX OAKLAND CALIF 13 1229PMP=

=H ALLEN SMITH, CHAIRMAN JUDICIARY COMMITTEE 1956 JAN 13 PM 1 06

=530 WEST 6 ST LOSA=

=FIFTY-TWO CHIEFS OF POLICE, ZONE 2, UNANIMOUSLY PASSED THE FOLLOWING RESOLUTION TODAY.

¶ WHEREAS THE RECENT CALIFORNIA SUPREME COURT DECISIONS ON SEARCH AND SEIZURE HAVE SERIOUSLY HAMPERED LAW ENFORCEMENT OFFICERS IN THE CONTROL OF ALL TYPES OF CRIME;

¶ THEREFORE BE IT RESOLVED THAT THE ASSEMBLY JUDICIARY COMMITTEE INTRODUCE AND RECOMMEND THE PASSAGE OF A BILL AT THE FORTHCOMING SPECIAL SESSION OF THE LEGISLATURE RESTORING THE ADMISSIBILITY OF SO-CALLED "ILLEGALLY OBTAINED EVIDENCE" AT LEAST IN NARCOTIC CASES.

¶ BE IT FURTHER RESOLVED THAT IT IS VERY DESIRIOUS OF RESTORING THE ADMISSIBILITY OF SO-CALLED ILLEGALLY OBTAINED EVIDENCE IN ALL TYPES OF CRIMINAL CASES OIF CRIME IS TO BE KEPT UNDER CONTTROL IN CALIFORNIA, BUT THAT IT IS MANDATORY TO RESTORE THIS RIGHT IN NARCOTIC CASES IF THE PRESENT INTOLERABLE SITUATION IS TO BE ALEVIATED=

=CHIEF W W VERNON OAKLAND POLICE DEPT CHAIRMAN SPECIAL COMMITTEE ZONE 2

¶ CHIEF CHARLES BROWN RICHMOND POLICE DEPT MEMBER SPECIAL COMMITTEE ZONE 2

¶ CHIEF DON WOODS SAN ANSELMO POLICE DEPT MEMBER

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION

1220

W. P. MARSHALL, PRESIDENT

SYMBOLS
DL=Day Letter
NL=Night Letter
LT=Int'l Letter Telegram
VLT=Int'l Victory Ltr.

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

SPECIAL COMMITTEE ZONE 2

1956 JAN 13 PM 1 06

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

IN CHAMBERS
MUNICIPAL COURT
LOS ANGELES JUDICIAL DISTRICT
MORTON L. BARKER, JUDGE

January 13, 1956

Mr. H. Allen Smith
Chairman, Assembly Judiciary Committee
400 Security Title Insurance Building
530 West Sixth Street
Los Angeles 14, California

My dear Allen:

I am very sorry that it was not possible for me to appear before your Committee yesterday. As I informed you I had a dental appointment at 12:30 and had to return for my afternoon calendar in Van Nuys at 1:30. I am sure that probably everything that I might have said was covered by the other speakers.

For your information, I enclose a copy of the statement which I had proposed reading.

Very sincerely yours,

Morton L. Barker

MLB:mb

Enc.

Chairman Smith and Committee Members:

I appear here today primarily in the capacity of citizen, rather than as Judge. From the imposing array of witnesses whom you have invited to appear before you, I am certain that all that I have to say has either been said and will be said a great many times during this hearing and probably a great deal better than I can say it. Despite this fact, I should like to offer several comments for your consideration.

The matter you are considering is not one of law, but involves a question of public policy. One's answer to this question depends entirely on his social and political viewpoint. By political I do not mean partisan politics, but rather one's feelings as to the obligations of government to the individual citizen weighed against the general public interest in the detection and suppression of crime.

There appears to be no doubt but what so far as constitutional limitations are concerned, the exclusionary rule is not mandatory but is governed entirely from the socio-political viewpoint of the person or body considering the matter.

Objectively stated, the question is this: Has the conduct of police officers in matters of unlawful searches reached such a state as to require the Courts to refuse to consider evidence which was obtained contrary to established rules of law, even tho such evidence establishes the guilt of the person in whose possession it was found.

From the language of the Cahan Case, it is apparent that it was concern over such a state which influenced the Court in its decision because it is declared: "..... the constitutional provisions make no distinction between the guilty and the innocent and it would be manifestly impossible to protect the rights of the innocent if the police were permitted to justify unreasonable searches and seizures on the ground that they assumed their victims were criminals. Thus, when consideration is directed to the question of the admissibility of evidence obtained in violation of the constitutional provisions, it bears emphasis that the Court is not concerned solely with the rights of the Defendant before it however guilty he may appear, but with the constitutional right of all the people to be secure in their homes, persons and effects."

My opposition to the exclusionary rule is based on three grounds:

1. There has always existed a sufficient restraining influence against the invasion of constitutional rights of innocent persons, by police officers in the form of liability for damages in a civil action for such unlawful invasion;

2. The number of instances of the invasion of constitutional rights of innocent victims is so small that, considering the public interest in the detection and suppression of crime, the general welfare demands that the exclusionary rule not be applied;

3. Because the narcotic problem has reached such alarming proportions and because of the secret and devious methods used by narcotic dealers and users, special rules of evidence should be adopted in prosecutions for this type of offense.

If we should assume that out of every 100 persons who were illegally searched (as defined in the Cahan decision), only one of such searches failed to produce proof of the guilt of the person searched, would this establish such a threat to constitutional liberties as to require the suppression of the evidence obtained by such search?

I know of no way in which the numbers involved in the last question can be established but based on my experience, I would say that the figure of one out of 100 is conservative.

Would it be in the general public interest to permit the 99 guilty persons go free in order to protect the one innocent person?

It is the policy of this State to require that proof of the guilt of a defendant in a criminal proceeding be established beyond a reasonable doubt under the theory that it is better that a number of guilty persons escape punishment than for one innocent person to be convicted.

This policy has no relation to the problem before you. In the case of so-called unlawful searches, the evidence produced by the search is direct proof pointing to the guilt of the person searched and in the great majority of cases conslusively establishes such guilt.

It is to be noted that objection is not made in behalf of the persons whose guilt was established by the unlawful searches. The sole concern of those who argue for the exclusionary rule is the protection of the innocent victims of unlawful searches, of the one in 100 searches.

If the rights of those innocent victims could only be protected by the suppression of evidence obtained

by illegal methods, the argument with respect to weighing the conflicting questions of public policy involved in the detection and suppression of crime versus the constitutional right of the innocent victim would be made stronger in favor of the exclusionary rule.

But the innocent victim has means whereby to redress the wrong done him for the invasion of his constitutional rights. He may recover money damages for such invasion.

Is the exclusionary rule necessary to secure the Constitutional rights of all citizens or as Dean Wigmore says, is the exclusion of such evidence based upon "misguided sentimentality" as set forth in Justice Spence's dissenting opinion of the Cahan Case.

To suppose the existence of that chaotic state where there are widespread invasions of constitutional rights, it would be necessary first to assume that the Courts were helpless to prevent such conduct. To state the proposition is to answer it.

It has been my experience, as I am sure is the case of all others appearing before you, that the exclusionary rule has been invoked almost entirely in cases involving narcotics and bookmaking. So far as I can recall, all of the reported cases from the Appellate Courts in this jurisdiction have dealt with these two types of criminals. In my opinion, because of the extreme difficulty of apprehension encountered in these types of cases, they should receive different treatment.

When it is considered that dealings of narcotics are made on street corners, in bars and often in the early

morning hours and without any opportunity for prior information on the subject by the police officers, it is manifestly impossible for them to obtain search warrants in all cases. It is principally thru the use of informers that information concerning a transaction involving narcotics is obtained and then often during the hours when the Courts are not in session. When bookmakers engage in such acts as recording their bets on the enameled surface of a stove with a crayon and shortly thereafter erasing them with a solvent, or using the so-called magic slates on which the writing can be instantly removed by lifting a sheet of cellophane, what opportunity is there for an officer to obtain a search warrant.

It is my opinion that if the exclusionary rule were not applied to bookmaking and narcotic cases, the work of the police officers would be greatly facilitated although I urge that the rule be entirely set aside by legislative action.

So far as I am concerned, it gives me a feeling of frustration to order the exclusion of evidence which in itself establishes, beyond question, the guilt of a defendant.

May I close with the statement that it is my opinion that there is no threat to our constitutional liberties thru unlawful searches and seizures and that whenever a n unlawful search and seizure is made, an adequate remedy is available. I, therefore, urge that legislation be adopted for the purpose of expressing

what I am sure, is the opinion of all the law-abiding citizens of this State, to-wit, the restoration by Statute of the rule with regards to the admission of evidence as it existed before the Cahan Decision.

ILLEGAL SEARCHES AND SEIZURES TRANSCRIPT SENT TO:

Professor Edward L. Barrett
University of California Law School
Berkeley, California

Hon. John A. Hewicker
Judge, Superior Court
San Diego, California

Hon. Edwin J. Regan, Chairman
Senate Committee on Judiciary
Sacramento, California

Carl Eggers, Chief
Glendale Police Department

William H. Parker, Chief
Los Angeles Police Department

S. Ernest Roll, District Attorney
County of Los Angeles

Peter J. Pitchess, Under Sheriff
County of Los Angeles

Bradford M. Crittenden, District Attorney
County of San Joaquin

Walter R. Creighton, Chief
Bureau of Narcotics Enforcement
San Francisco

Thomas C. Lynch, District Attorney
City and County of San Francisco
San Francisco, Calif.

Hon. Charles A. Fricke
Judge of the Superior Court
Los Angeles

Roger Arnebergh, City Attorney
City of Los Angeles

J. H. Holstrom, Chief
Berkeley Police Department
Berkeley, California

Willard Carpenter, Administrative Assistant
American Civil Liberties Union
5927 Sunset Boulevard, Suite 204
Los Angeles 28, California

Al Hederman, Jr.
District Attorneys' Office
Alameda County
Oakland, Calif.

Jay Martin, Legislative Representative
District Attorneys' and Peace Officers' Associations
Alameda County District Attorney's Office
Oakland, California

Ralph Kleps, Legislative Counsel
State Capitol
Sacramento

Tom Martin, Assistant Attorney General
Library and Courts Building
Sacramento

All members of Judiciary Committee

March 26, 1956

Willard Carpenter, Administrative Assistant
American Civil Liberties Union
5927 Sunset Boulevard, Suite 204
Los Angeles 28, California

Dear Mr. Carpenter:

In accordance with your request, a transcript of the proceedings of the Judiciary Subcommittee on Illegal Searches and Seizures, held in Los Angeles on January 11th and 12th, 1956, is being forwarded to you under separate cover.

In view of the fact that there is a limited supply of the transcripts available, I would appreciate it if you would see that Mr. A. L. Wirin has an opportunity to read the same if he so desires.

Very truly yours,

H. Allen Smith

HAS:gs

WED'SDAY

FEB. 1956						
S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29			

21

MAR. 1956

APR. 1956						
S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Check on the
to get permission
& Benjamin

MARCH 1956						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

MAR. 1956

TUESDAY 20

January 26, 1956

Mr. Willard Carpenter
Administrative Assistant
American Civil Liberties Union
5927 Sunset Boulevard, Suite 204
Los Angeles 28, California

Dear Mr. Carpenter:

Receipt is acknowledged of your letter dated January 25th, 1956, and I am not just certain when the transcript will be completed and whether or not we will run off copies for other than the members of the Assembly Judiciary Committee.

I will, however, keep your letter and if you don't hear from me again in thirty days, I suggest you make a further request so that I can discuss the matter with the committee.

Very truly yours,

H. ALLEN SMITH

HAS/fp

AMERICAN CIVIL LIBERTIES UNION

SOUTHERN CALIFORNIA BRANCH
5927 Sunset Blvd. - Suite 204
Los Angeles 28, California
HOllywood 1-9926

January 25, 1956

Hon. H. Allen Smith
1620 Las Flores Drive
Glendale 7, California

Dear Mr. Smith

May we please have a copy of the testimony given at your recent hearings studying the Cahan decision in Los Angeles.

Sincerely yours

Willard Carpenter
Administrative Assistant

March 22, 1956

Professor Edward L. Barrett
University of California Law School
Berkeley, California

Dear Professor Barrett:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution, and inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have considerable numbers of requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Hon. John A. Hewicker
Judge, Superior Court
County of San Diego
San Diego, California

Dear Judge Hewicker:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956. After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

I would also appreciate it very much if you would allow Judge Turrentine to review the transcript so that I may have the benefit of his suggestions. As you probably know, I have nothing but the highest respect for Judge Turrentine and the wonderful cooperation he has extended to me over the years.

Very truly yours,

H. Allen Smith

HAS:gs
cc: Hon. L. N. Turrentine

March 23, 1956

Hon. Edwin J. Regan, Chairman
Senate Committee on Judiciary
State Capitol
Sacramento, California

Dear Eddie:

You will recall I told you that when the transcript of proceedings of the Assembly Judiciary Subcommittee on Illegal Searches and Seizures was prepared I would provide you with a copy. Please find same enclosed.

If you have need for additional copies for the members of your subcommittee, please let me know. You will note, however, that this is rather extensive, and I don't have any more than enough copies to distribute to those persons who may be interested.

I think this pretty well covers the subject, and based upon the information therein, we should be able to come to some conclusions as to necessary legislation at the 1957 Session.

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Carl Eggers, Chief
Glendale Police Department
Glendale, California

Dear Carl:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreicate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

William H. Parker, Chief
Los Angeles Police Department
Los Angeles, California

Dear Bill:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

S. Ernest Roll, District Attorney
County of Los Angeles
Los Angeles, California

Dear Ernie:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Peter J. Pitchess, Undersheriff
County of Los Angeles
Los Angeles, California

Dear Pete:

Under separate cover this is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Bradford M. Crittenden, District Attorney
County of San Joaquin
Stockton, California

Dear Brad:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreicate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Walter R. Creighton, Chief
Bureau of Narcotics Enforcement
Attorney General's Office
Library and Courts Building
Sacramento, California

Dear Walter:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Thomas C. Lynch, District Attorney
City and County of San Francisco
San Francisco, California

Dear Tom:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. Inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have had considerable requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Hon. Charles A. Fricke
Judge of the Superior Court
County of Los Angeles
Los Angeles, California

Dear Judge Fricke:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution. After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

March 23, 1956

Roger Arnebergh, City Attorney
City of Los Angeles
Los Angeles, California

Dear Roger:

Under separate cover there is being forwarded to you a transcript of the proceedings of the Judiciary Subcommittee on Searches and Seizures covering the hearing held in Los Angeles on January 11th and 12th, 1956.

You will note that this is a sizable document, which is the occasion for somewhat of a delay in its preparation for distribution, and inasmuch as this has been rather costly, should you find you do not have use for it in the future, please return it to me rather than destroy it as I have considerable numbers of requests for it.

After reviewing the transcript, I would appreciate any suggestions you may have relative to legislation to be offered at the 1957 General Session of the Legislature.

Thanking you for your cooperation, I remain

Very truly yours,

H. Allen Smith

HAS:gs

PENAL CODE SECTION 1524, Subdivision 6 (NEW).

"When the property is a contraband, or a narcotic, the use, possession or sale of which is prohibited by the State Narcotic Act, in which case it may be taken on a warrant from the place in which it is concealed, or from any person in whose possession it may be."

PENAL CODE SECTION 1525A, (NEW).

"When the property seized is a contraband, or a narcotic, the possession, use or sale of which is prohibited by the State Narcotic Act, the affidavit for a search warrant shall be sufficient if it is based on information obtained by the person signing the affidavit, from a reliable informant; the identity of the informant need not be revealed where the public interest would suffer by the disclosure."

Ex I

LAW OFFICE
402 SECURITY TITLE INSURANCE BLDG.
530 WEST SIXTH STREET
LOS ANGELES 14, CALIFORNIA
MADISON 6-4457

SACRAMENTO ADDRESS
STATE CAPITOL
ZONE 14

COMMITTEES
FINANCE AND INSURANCE
JUDICIARY
VICE CHAIRMAN
LEGISLATIVE REPRESENTATION
PUBLIC HEALTH

Assembly
California Legislature

H. ALLEN SMITH
MEMBER OF ASSEMBLY, FORTY-THIRD DISTRICT

Subcommittee Hearing of

Assembly Judiciary Committee to Study Illegal Searches and Seizures, the Laws of Arrest, the Exclusionary Rule and Narcotics - Hearing at Los Angeles, January 11, 12, 1956.

Statement by Chairman H. Allen Smith, 43rd District, Glendale.

On April 27, 1955, the California Supreme Court, by a 4-3 decision reversed the previous conviction of Charles H. Cahan, in the case of People vs. Cahan, 44 A.C. 461. Within a few weeks thereafter, it appeared that there was considerable confusion in the field of criminal procedure as to what was now the law of arrest, search and seizure. Several members of the legislature were contacted by law enforcement agencies with the request that the laws be rewritten. Although the Legislature was in session, the time before adjournment was so short that it was impossible to make any changes at the 1955 session. Accordingly, the Assembly, by resolution, requested the Assembly Judiciary Committee to appoint a subcommittee to study the matter, and the Senate, in turn, requested the Senate Judiciary Committee to study the matter. This is the Assembly Judiciary Subcommittee. In turn we have asked the Senate Judiciary Subcommittee

to sit with us at this hearing. The members of the State Legislature here today are: (Introduce them)

It should be kept in mind that nothing can be done until the general session in 1957 unless it appears that changes should be made during 1956, and in turn, the Governor would agree to open the call to the subject matter.

The State Legislature can only make the laws, we cannot enforce them. However, our understanding, and I believe I speak for the other members here today, is that the U. S. Constitution, and its amendments, as well as the California State Constitution secures every citizen from unreasonable search and seizure. Accordingly, a warrant, authorized upon a showing of probable cause, supported by affidavit, particularly describing the person or place to be searched, and the things to be seized, must first be obtained.

A review of the situation reflects that at common law the admissibility of the evidence obtained was not affected by the illegality of the means by which it was obtained. However, in 1914, the U. S. Supreme Court, in the case of Weeks vs. the United States, 232 U.S. 383, announced the rule that the use of such evidence is to be precluded if the defendant makes seasonable application for the return of the things illegally seized or upon motion to suppress. This is now known as the "exclusionary rule." It is to be noted that this is not a constitutional right but a rule of law.

A search warrant may issue for seizure of property in which the government or public has a paramount interest, Gould vs.

United States, 225 U.S. 298, however it may not be issued for the seizure of property which has evidenciary value only, such as contracts, letters or invoices solely for use in evidence in a subsequent criminal trial. Seizure of stolen goods, contraband, "instrumentalities of crime" and articles seized to prevent further frauds is permitted.

The Supreme Court of the U.S. has been very firm in upholding the exclusionary rule that any indirect or derivative use of evidence unreasonably seized is prohibited. As an example, in Silverthorne Lumber Co. v. U.S., 251 U. S. 385, the company's offices were entered, without a warrant, and all records were seized. A motion to return the property was granted. Thereafter the government issued subpoenas requiring the company to produce the originals for trial. The Supreme Court held that this was indirect use of evidence obtained illegally in the original instance and thus prohibited.

Now, in the Cahan case, he was charged with conspiring to engage in horse-race bookmaking and related offenses in violation of Section 337a of the California Penal Code and was convicted. He appealed, and the Supreme Court, by a 4-3 decision reversed the conviction. Most of the evidence obtained was in violation of the unreasonable search and seizure clauses of the U.S. and State Constitution. Some was obtained by installing microphones in certain houses, after breaking and entering, and recording conversations carried on in those houses and nearby garages. The Court also stated that in addition "there was a mass of evidence obtained by numerous

forcible entries and seizures without search warrants." Overruling prior decisions to the contrary the California Supreme Court held that the evidence was illegally obtained and inadmissible. This was the first time that the Federal exclusionary rule was invoked in California. Prior thereto, the evidence was admitted and the defendant was left to an action in damages against the officers.

It is again noted that neither the 4th or 5th amendments bar admission of illegally obtained evidence, nor does the Constitution of either the United States or California, and that the Federal exclusionary rule is a judicially created rule. Now in Irvine v. California, 347 U.S. 128, the U. S. Supreme Court indicated that the State Courts might well reconsider their evidenciary rules. They thought it would be wrong to upset state convictions before giving the states an opportunity to adopt or reject the exclusionary rule. Possibly this had some affect on the California Supreme Court in the Cahan case. We don't know, but simply offer it as a comment. They further continued that, after the States have had the opportunity to reconsider their rules, the United States Supreme Court could act accordingly.

In the Cahan case, the majority opinion in adopting the exclusionary rule stated that remedies against police officers have failed, and that the courts have been required to participate in, and condone, the lawless activities of enforcement officers; further, that civil actions against officers are rare, and those involving criminal prosecutions are non-existent. The majority opinion noted that in some cases officers have no choice but to secure evidence illegally, and that some criminals will escape punishment.

The Court said they were not adopting the Federal rule in detail and that certain details would still have to be worked out; that the Federal exclusionary rule has been arbitrary and has introduced needless confusion into the law of criminal procedure. They felt that adopting the rule need not introduce confusion into the law of criminal procedure; that, instead, it opens the door to workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime.

The three dissenting justices felt that the present remedies are sufficient to give the victim adequate redress. Further, that guilty persons will be freed; that, in effect, the exclusionary rule deprives society of its remedy against one lawbreaker because he has been pursued by another. Further that the former California rule was certain and that the new rule would create great uncertainty. And that, as the majority stated, workable rules are still to be worked out, yet, in the meantime, the trial courts have no rules to guide them. They would have preferred to retain the non-exclusionary rule and let the legislature consider the imposition of civil liability for illegal practices upon the government agencies employing the offending officers, in addition to the liability now imposed against the officer, and that the legislature consider fixing a minimum amount to be recovered as damages for invasion of his civil rights.

It appears to me, and I believe this committee will agree with me that Congress can negate the exclusionary rule. No doubt the California State Legislature can do likewise. The legislature can

if possible, devise means of discouraging illegal searches and seizures that would be so effective as to render the exclusionary rule no longer necessary.

Here today we want to see what the effect of the Cahan case has been, whether law enforcement, prosecutors and courts are confused and handicapped, and whether the Legislature can and should make any changes in the law. We realize that there may be differences of opinion among those who will appear before us, but I'm sure we all respect one another's opinion, and that, collectively, we would all like to place a stop to crime if we could.

Those invited to attend are:

Attorney General Edmund G. Pat Brown
Chief, Bureau of Narcotic Enforcement Walter R. Creighton
Deputy Commissioner, Federal Narcotic Bureau B. T. Mitchell
District Attorney S. Ernest Roll, Los Angeles County
District Attorney Bradford M. Crittenden, San Joaquin County
District Attorney J. F. Coakley, Alameda County
District Attorney Thomas C. Lynch, San Francisco County
District Attorney J. D. Keller, San Diego County
Superior Court Judges: Charles W. Fricke
Leroy Dawson
David Coleman
Philip H. Richards
Mildred L. Lillie
Stanley Mosk
John A. Hewicker
Walter H. Odemar
Municipal Court Judges: Vernon Hunt
Morton L. Barker
John F. Iaso
Sheriff Eugene W. Biscailuz
Undersheriff Peter Pitchess
Chief Fred Fimbres, Sheriff's Department
Chiefs of Police: William H. Parker, Los Angeles
Carl Eggers, Glendale
Rex Andrews, Burbank
Clarence H. Morris, Pasadena
George M. Healy, San Francisco
Edward J. Allen, Santa Ana
Horace V. Grayson, Bakersfield
James V. Hicks, Sacramento

County Counsel Hal Kennedy
City Attorney Roger Arnebergh
Edward L. Barrett, Jr., Professor of Law, University of California
Representatives of Citizens Advisory Committee
Representatives of Civil Liberties Union

I know that your time is valuable and hope I can reasonably please you as to the times you wish to testify.

STATEMENT OF S. ERNEST ROLL AT ASSEMBLY JUDICIARY SUBCOMMITTEE HEARING ON ILLEGAL SEARCHES, SEIZURES AND THE LAW OF ARREST.
LOS ANGELES, CALIFORNIA
JANUARY 11-12, 1956

HISTORICAL BACKGROUND
EXCLUSIONARY RULE OF EVIDENCE IN CALIFORNIA

On February 8, 1954, the Supreme Court of the United States decided the case of People v. Irvine. This was a matter wherein officers entered a home in the City of Long Beach, without permission of the owner, and concealed a microphone to procure evidence in connection with violations of Section 337a of the Penal Code - Bookmaking.

The opinion of the Supreme Court in this case condemned this practice and this method of procuring evidence, and, in fact, stated: "Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment."

As a result of the Irvine case, I immediately requested an opinion of Attorney General Edmund G. Brown, asking clarification as to what, among other things, constituted unreasonable searches and seizures, and what the powers, rights and duties of police officers and prosecuting agencies were in connection with matters of this character. A portion of the Attorney General's opinion Sept 4, 1954 read as follows: "There can be no room here for quibbling over the holdings of the Irvine case. The articulate premise of the decision is that officers involved have violated Irvine's Constitutional rights. Therefore, law officers who engage in such conduct violate their oath to support and follow the Constitution of the

United States and the Constitution of the State of California."

We now come to the Cahan case. In May of 1953, Los Angeles Police Department vice officers brought to my Complaint Division evidence gathered in January and April of that year which showed that Cahan and others had been engaging in bookmaking within the City of Los Angeles. The defendants subsequently were tried and convicted before the United States Supreme Court handed down its strong decision in the Irvine case.

Since the Cahan conviction was based in part on evidence gathered by trespassing officers, the defendants appealed to the California Supreme Court and on April 27, 1955, won a reversal.

I think all of you are familiar with the holding of the Cahan case. In substance, it is that evidence obtained in violation of Constitutional guarantees is inadmissible. The Court, however, in the majority opinion stated: "In determining a rule of evidence applicable to the State Court, this Court is not bound by the decisions which apply the Federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them...instead it opens a door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by Constitutional provisions in the interest of society and the suppression of crime."

Immediately upon the announcement of the decision in the Cahan case, as District Attorney I called a meeting of the Chiefs of Police, the Sheriff, and other law enforcement agencies in Los Angeles County. Attorney General Brown and myself advised the officers generally in

connection with the opinion, I thereafter assigned Deputy District Attorney Arthur Alarcon to provide a brief on the subject of the Exclusionary Rule of Evidence. Copies of this will be furnished to your Committee.

In order to pass upon matters involving the Exclusionary Rule of Evidence, both pending in court and being received by the Complaint Division, I set up a board of five Deputy District Attorneys, composed of Assistant Chief Deputy Adolphe Alexander, Chief Deputy George Kemp, Chief Trial Deputy Al Colgrove, Chief of the Complaint Division, Howard Hurd, and Deputy District Attorneys Arthur Alarcon and A. B. Nathanson.

As you know, District Attorneys and City Prosecutors act in a quasi-judicial capacity when issuing criminal complaints. This has been decided by appellate Courts. Therefore, I have ordered that in all cases where the Exclusionary Rule appears to be involved, the board that I just mentioned must first review the facts before a complaint is issued or ~~conviction is sought by our trial deputies in the Superior Court.~~ We actually exercise quasi-judicial functions.

I have checked our records in this regard and found that since the Cahan decision was handed down, only 19 **felony narcotics complaints sought** by the Los Angeles Police Department have been refused by my office because they were based on evidence objectionable to the Supreme Court in the Cahan case.

This board further passes upon cases which are dismissed by the Municipal Court Judges sitting as Committing Magistrates in preliminary hearings where the dismissal involves the application of the Cahan decision. The board actually recommended that five of such cases involving six defendants be referred to the Los Angeles County Grand Jury each year for their consideration for indictment, and all five cases involving the following defendants were

so submitted: Willie Gould, Clarence and Celeste Winfrey, Alfred W. Gregg, Robert Dorsey Sayles and Joe Cardona. Indictments in each of these cases were returned by the Grand Jury to the Superior Court. This procedure was adopted so that the Superior Courts would have the opportunity of legally passing on these matters.

In connection with pending cases, this board also passed on the feasibility of taking appeals and there are approximately 12 cases this office appealed in connection with the matters involving the Exclusionary Rule. These steps were taken because we felt it was necessary to get an immediate decision from the Supreme Court of the State of California on the various points involved in these cases, so that law enforcement officers would know how to proceed when confronted with these problems in the field. The Supreme Court took these cases over from all Appellate Districts throughout the state on order of Chief Justice Gibson. It is interesting to note that the Supreme Court has already passed on five of the cases from Los Angeles County, three of which they ruled in our favor.

Several years ago, in Los Angeles County, in cooperation with the Los Angeles County Grand Jury, we adopted the technique of mass indictments, particularly for sellers of narcotics.

The 1955 Los Angeles County Grand Jury, based on Los Angeles Police Department investigations, returned the following indictments against individuals charged with narcotics offenses:

February 7, 1955 - 41 (39 of which were sellers and 2 for possession).
June 8, 1955 - 3 individuals indicted for possession. (These cases involved the exclusionary rule.)
June 21, 1955 - 22 individuals indicted for sale.
November 15, 1955 - 35 individuals indicted for sale.

On September 27, 1955, the Grand Jury also indicted nineteen individuals solely on evidence gathered by the Bureau of Investigation of the District Attorney's Office.

In this connection, it is interesting to note a letter received by Deputy District Attorney Fred Henderson, Legal Advisor to the Los Angeles County Grand Jury, from Deputy Chief of Police Thad Brown, Commander of the Detective Bureau of the L.A. Police Dept. This letter is dated October 20, 1955, and copies are being furnished to your committee. In this letter Chief Brown points out that "As our techniques in the field of narcotic enforcement have improved, we have found it possible to reach an increasingly higher strata of narcotic peddler violators." This letter further states: "Of interest to the present Grand Jury, which since February of this year has indicted 74 persons as a result of evidence presented by the Narcotic Division of this Department, is the record of 98.2% convictions with the major portion of this percentage being sentenced to the state prison for a term of from 10 years to life."

At this point, in view of some of the statements which have been made, I desire to publicly state that as the chief legal prosecuting officer in Los Angeles County, I firmly believe that we have on our Superior bench and Municipal bench of this county, the finest group of Judges in any community in our Nation. The Judges of Los Angeles County will administer the law as you members of the Legislature enact it and will follow the decisions of the Supreme Court of the State of California, as should all persons engaged in law enforcement.

REMEDIAL LEGISLATION

#12 It is my belief that by reason of the adoption of the Exclusionary Rule of Evidence in California, certain remedial legislation is necessary, and that Governor Goodwin J. Knight should be requested to open the call for the same at the March, 1956 session of the California Legislature. As a matter of fact, as District Attorney, I, personally, made this written request to Governor Knight in June of 1955.

#13 It is my positive recommendation that the California statutes on search warrants and the law of arrest should be amended, revised, and, in some instances, new laws should be enacted. This legislation can be enacted in such a manner as to protect Constitutional guarantees and yet give the law enforcement officers new legal weapons needed in their war on crime and criminals.

Now ON THE SUBJECT OF SEARCH WARRANTS

The California statute on search warrants as it now reads limits the objects which may be seized upon a search warrant to:

#14

1. Items which have been stolen or embezzled.
2. Items used as a means of committing a felony.
3. Items in the possession of a person with the intent to use the same as a means of committing a public offense.
4. (And I don't for the life of me know what this means) Items such as casks, kegs, bottles, vessels, syphons, etc., which bear trademarks, and are in the possession of any person except the owner thereof with an intent to sell or traffic in the same. (Section ~~1225~~ 1524, Penal Code.)

Thus, it can be seen at the present time that the right to a search warrant is highly restricted and can only be used in a very limited field. There is an urgent need, therefore, for modernization of the law pertaining to search warrants in the light of the Exclusionary Rule.

The Fourth Amendment to the Federal Constitution and the California Constitution, Article I, Section 19, provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant issued, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized." (Emphasis added.)

Both the spirit and the letter of the principles enunciated in the Cahan case would be carried out if the Legislature broadened and modernized Penal Code Sections ~~1225~~ 1524 and 1525 on search warrants.

My recommendations with regard to search warrants are twofold in nature; one pertains to property which tends to show a public offense has been committed; in other words, evidentiary matters. and two, covers the field of narcotic violations.

In regard to number one, I believe that the statutes concerning search warrants should be amended to set out additional items which can be seized under search warrants, and thus permit the legal seizure of incriminating matter of an evidentiary nature.

Good police investigative techniques often require that a careful search be made of the scene of the crime to determine if there are some tangible clues which point to the commission of a crime and to the

perpetrator thereof. Such things, for example, as fingerprints, hair, fibers, threads, blood-stained clothing, etc., often lead to the arrest of persons guilty of crimes. Without this type of evidence, many of our criminal cases would be lost and many of those responsible for crimes would never be apprehended.

We feel it necessary, therefore, to include within the things which may be seized upon a search warrant, evidentiary matter.

you have as a witness here which I read several times

Professor Edward L. Barrett, Jr., from an article in the California Law Review, under date of October, 1955, has the following statement to make in connection with search warrants:

> "As a matter of practice, however, search warrants are seldom used by the police. In populous Los Angeles County, for example, only 17 such warrants were issued in all of 1954. Several reasons are offered by police and prosecutors for this failure to use the warrant procedure. First, the limitation as to the types of property for which a warrant may issue; second, is the requirement of particularly describing the property to be seized; and third, the time necessarily consumed in the issuance of the warrant."

Professor Barrett, in a footnote, sets out the affidavit of William H. Parker, Chief of Police of the City of Los Angeles, in the case of People v. Cahan, wherein the Chief has made these observations:

> "Under Section 1524 of the Penal Code, a search under a warrant may not be made for evidence as such, but only for stolen property or for the tools of a crime, although they

also may incidentally be material evidence of a crime."

PROPOSED AMENDMENT TO SEARCH WARRANT LAWS RE: A RIGHT TO SEARCH FOR PROPERTY WHICH TENDS TO SHOW A PUBLIC OFFENSE HAS BEEN COMMITTED

Under this proposed amendment, evidentiary items could be seized by law enforcement officers under a search warrant. A magistrate would first pass on the propriety of the affidavit for the search warrant, and none would issue except on probable cause. In this manner, the Constitutional rights of the person involved would be fully protected. To cover this situation I, therefore, propose the following amendment to Penal Code Section 1524, to be known as Section 1524, Subdivision 5, adding to the items which can be seized under a search warrant, the following:

> "When the property consists of any item which tends to show a public offense has been committed, or tends to show that a particular person has committed a public offense."

PROPOSED AMENDMENT TO SEARCH WARRANT LAWS RE NARCOTICS

Section 1525 of the Penal Code provides as follows:

> "A search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the person, and particularly describing the property and place to be searched."

Nowhere in the statute does a definition exist of the phrase probable cause. The California Supreme Court recently stated in the case of People v. Maxine Ann Boyles, filed November 25, 1955, that

may "consist of information obtained from others and is not limited to evidence that would be admissible on the trial of the issue of guilt."

I propose codifying the recent holding of the Supreme Court decision in the Boyles case in so far as a reference to the type of information necessary for probable cause. In this matter, two objectives would be accomplished. First, the law would be uniform with relation to the type of information necessary to justify searches based on probable cause without a search warrant as an incident to a lawful arrest, and searches made pursuant to a search warrant based on probable cause.

Second, because illicit trafficing in narcotics is done under cover, it is almost impossible to trap the peddlers or sellers of narcotics without using informants. Unless the officers can assure these informants that they will be protected from retribution, no one will come forward and assist in the apprehension of the big entrepreneurs in narcotic peddling.

The enactment of this new section will still afford private citizens the full Constitutional protection demanded by the California Supreme Court in the Cahan case. Before a search warrant would issue under the proposed section to search an individual's property or person, a magistrate would first have to decide that probable cause exists.

The necessity for the protection of the identity of the informants has long been recognized by both the Legislature and the Appellate Courts. (Sections 1881.5 of the Code of Civil Procedure, and People v. Gonzales, 136 A.C.A., 476, October 21, 1955.) In this case, the court stated:

"It is clear that the public interests would suffer if the disclosure were compelled of the names of those citizens who informed public officers of violations of law, and who assist such officers in the performance of their duty to apprehend law violators. A citizen who knows that the fact would be made public that he has disclosed such information to public officers may be loathe to cooperate in the administration of justice. By exercising his right and duty to make such disclosures, he would justifiably believe himself to be in danger of physical violence from those upon whom he had informed, as well as in danger of actions of slander and malicious prosecution."

In order to give law enforcement agencies much needed help in the narcotics field, the following specific recommendations are made concerning new legislation:

1. An addition to existing Penal Code, Section 1524, to be known as 1524, Subdivision 6 (New).

   "When the property is a contraband, or a narcotic, the use, possession or sale of which is prohibited by the State Narcotic Act, in which case it may be taken on a warrant from the place in which it is concealed, or from any person in whose possession it may be."

2. I further recommend the following new section to the penal code to be known as Section 1525A.

"When the property seized is a contraband, or a narcotic, the possession, use or sale of which is prohibited by the State Narcotic Act, the affidavit for a search warrant shall be sufficient if it is based on information obtained by the person signing the affidavit, from a reliable informant; the identity of the informant need not be revealed where the public interest would suffer by the disclosure."

ON THE SUBJECT OF LAW OF ARREST

#18 Generally speaking, a search incident to a lawful arrest which is contemporaneous as to time and place or which is subsequent to the arrest, may be a reasonable search and seizure even though the arresting officer has no search warrant.

#19 In California the pertinent statutes in connection with the law of arrest have not been materially altered since 1872. Since then a number of innovations have had considerable impact on the techniques of law-breaking and law enforcement. Actually, the California law of arrest is a good deal older than 1872 since it is based almost completely upon provisions of the proposed Code of Criminal Procedure reported to the New York Legislature in 1850 (1850), which in turn had its roots far back in the Common Law.

The law of arrest by peace officers illustrates the discrepancy between existing statutes and developments in case law which have attempted to keep pace with the modern requirements of law enforcement.

In my opinion, our present law of arrest can be classified as being horse and buggy legislation in an electronic age. As a result of the antiquated statutes, the general public and most law enforcement officers have no readily available source of information as to the law of arrest. They are required to search the records of reported cases in the State of California in order to determine the modern interpretations of the law which in some instances affirms and in others modifies or even contradicts the language of the statutes.

#20 Immediately after the Cahan decision, members of ~~my~~ the L.A. D.A.'s office and of the Los Angeles City Attorney's Office met together, and prepared a draft of changes in the law of arrest to meet the requirements of modern law enforcement. Copies of this draft I now submit to this committee.

#21 This proposed draft has been submitted to a committee formed under the jurisdiction of Attorney General Edmund G. Brown. A subsection of this committee, under my chairmanship, has been given the task of preparing for the Legislature changes in the law of arrest.

This committee is at the present time considering the recommendations of law enforcement officers throughout the State as to any changes they may wish in the proposed draft. At this point it is also interesting to note that the Supreme Court ~~has~~ and I mentioned this before, has under submission approximately 20 cases involving the law of arrest and searches and seizures. The proposed amendments that I will submit to the committee should be viewed in the light of any later decisions that may come down from the Supreme Court on this matter.

#22 ON THE SUBJECT OF MOTIONS TO SUPPRESS EVIDENCE

I recommend that the Legislature also fix by law a statutory time for motions to suppress evidence in criminal cases wherein it is alleged that the evidence was illegally obtained in violation of the exclusionary rule and Constitutional rights. In considering this matter, the Legislature might take into consideration the Federal laws in this regard.

Now urged to another subject → INSTALLATION OF DICTOGRAPHS (BUGS) Sometimes referred to as

We have on the Statutes of the State of Calif.

Section 653h of the Penal Code of the State of California, enacted in 1941, reads as follows: And I won't read the entire section but I'll read the portion that I consider to be pertinent.

> Sec. 653h. (Unauthorized installation of dictographs: Grade of offense: Persons exempted.) Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any house, room, apartment, tenement, office, shop, warehouse, store, mill, barn, stable, or other building, tent, vessel, railroad car, vehicle, mine or any underground portion thereof, is guilty of a misdemeanor; provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

and then below that it says

In connection with this section, I specifically recommend that the Legislature amend the same by striking therefrom the following language: That is the latter portion which says

> ...provided, that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto by the head of his office or department or by a district attorney when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

This recommendation is made for several reasons. #23 In the opinion of Attorney General Edmund G. Brown, dated September 4, 1954, being No. 54-41, #24 in connection with Section 653h, the Attorney General said:

"It seems clear that a search and seizure by a lower law enforcement official which violates the Constitution cannot be other than unlawful when committed by the head of the police department or district attorney. If anything, the violation would seem more flagrant. The Fourth Amendment protects the people from unreasonable invasion of their privacy by the police (Wolf v. Colorado, 338 U.S. 25). Obviously, the determination of what is reasonable cannot be left to the police.

"The conclusion is compelled that the invocation of Penal Code 653h can give the police no greater rights than if the section did not exist. Their conduct should be governed accordingly."

In the case of People v. Cahan, in discussing Section 653h of the Penal Code, the court said:

#25

"Section 653h of the Penal Code does not and could not authorize violations of the Constitution and the proviso under which the officers purported to act at mosts prevents their conduct from constituting a violation of that section itself. ... The evidence obtained from the microphones was not the only unconstitutional evidence introduced at the trial over defendant's objections."

#26

Thus, it can be seen from the opinion of the Attorney General, above quoted, and the opinion of the Cahan case, that the latter portion of this section is unconstitutional and should be stricken from the

statutes. By doing so, it will call directly to the attention of everyone that if there is a violation by anyone of this section they can be prosecuted.

Consideration could also be given by the Legislature in connection with this section to whether or not the penalty provided therein is severe enough or whether it should be made a felony. I further recommend that the Legislature make it a criminal offense for anyone to use or attempt to use or communicate in any manner for any purpose, any information obtained by use of a dictograph in violation of Penal Code Section 653h. It should be noted that Penal Code Section 640, which is on our Statutes at the present time, makes it a criminal offense for anyone to use or divulge information obtained by wiretapping.

It is interesting to note that Professor Edward L. Barrett, Jr., Professor of Law of the University of California at Berkeley, who ~~I believe is to testify~~ testified here before your committee, in the California Law Review, October, 1955, in an article entitled "Exclusion of Evidence Obtained by Illegal Searches, A Comment on People v. Cahan," said as follows:

> "What then is the answer? Partly, of course, it lies in the direction of making more definite the rules governing police action. A clear legislative prohibition of the use of dictographs, for example, could be implemented by the imposition of personal penalties upon offending officers without interfering with effective police action in other ways."

It may be interesting to note that, to my knowledge, no case that we have prosecuted in the D.A.'s office involving the violation of the State Narcotic and Drug Act has been made in the past by the use of microphones or bugs installed in dwellings,

houses and the like by means of trespass. In other words, this technique has not been used by the law enforcement agencies in this county in connection with narcotic violations even before the Irvine case, the Attorney General's opinion or the Cahan decision.

SHOULD THE EXCLUSIONARY RULE BE WAIVED SO FAR AS IT APPLIES TO NARCOTIC OFFENSES

In my opinion, the only way the exclusionary rule could be waived in narcotic cases would be by a Constitutional amendment voted on by the People of the State of California.

This amendment would have to be to Article I, Section 19 of the Constitution of the State of California, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant issued, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized."

The State of Michigan has had the exclusionary rule since 1919. In order to give the police of the State of Michigan a freer hand in the obtaining of evidence in narcotic violations, the people of that state changed their Constitution. This amendment to the Constitution in Michigan was voted on by the people November 4, 1952, and was proposed by a joint resolution of the 1952 Legislature of that state. It, in substance, provides that evidence obtained by unreasonable search and seizure is admissible where the item seized is a narcotic and <u>where the seizure was outside the curtilage of any house.</u>

Thus, by amending their Constitution, the People of the State of Michigan voluntarily gave up their right to be protected from illegal searches and seizures in so far as their automobiles, personal belongings and clothing are concerned. But, you will note that they clung to the old Common Law concept that "a man's home is his castle" and refused to permit unsanctioned invasions of their dwelling houses and curtilages even where narcotics were involved.

If the people of this state should vote a similar amendment, I am not prepared to state what the Supreme Court of the United States would say as to whether acts done by police officers in pursuance to this amendment would be in violation of the Federal Constitution. As you gentlemen know, our Supreme Court is somewhat divided on this subject.

To my knowledge, no case from Michigan has gone to the Supreme Court of the United States on their Constitutional amendment. I am, therefore, calling this to your attention, not as a positive recommendation, but merely for your consideration.

In conclusion, may I state that I have been aware of the acuteness of the narcotic problem for some time. On January 28, 1953, I called a meeting of all Chiefs of Police and the Sheriff of this County on this problem. They were advised that narcotic violations had become one of the major offenses in this County and the State, and one of the crime-breeding problems of the day. They were requested to use every available man to ferret out violators. Additional personnel was added to many of the agencies and the Sheriff began an intensive training program for his own personnel, ~~as well as~~ the smaller police departments in the County.

In my opinion, law enforcement officers of this County realize the seriousness of the narcotic problem and are doing an excellent job of enforcement.

The District Attorney's Office, though primarily a legal prosecuting agency, has approached the narcotic problem from several angles.

In the enforcement field, we maintain a narcotic squad in the Bureau of Investigation. The men assigned work with all other agencies, and many times work on their own. One Investigator, working as an undercover operator, alone has made 24 cases of sale against narcotic peddlers last year.

In the legal field, all Deputy District Attorneys have maintained and will continue to maintain a policy of firmness in the handling of all narcotic cases from their inception to their conclusion.

Particular stress is laid on all cases involving peddlers of narcotics. This policy has paid dividends and we have a record of which no one can be honestly critical. It speaks for itself.

I sincerely appreciate the opportunity of appearing before this committee and desire to compliment each of you for your time and effort and assistance that you have and will give to law enforcement.

Law enforcement has to work with the tools it is furnished. You of the Legislature, in enacting laws and defining offenses and the penalties therefor, furnish some of the most important of these tools. I ask you to give serious consideration to implementing our tools, but only along Constitutional lines.

SFR:ld
January, 1956

PENAL CODE SECTION 1524, Subdivision 5 (NEW).

"When the property consists of any item which tends to show a public offense has been committed, or tends to show that a particular person has committed a public offense."

ADDRESS OF J. FRANK COAKLEY,

District Attorney of Alameda County,
at the Judges' Conference
During the Annual Meeting of
the State Bar of California
at San Francisco on September 13, 1955.

The majority opinion in People v. Cahan has resulted in confusion among judges, law enforcement officers and district attorneys. The reason for this reaction is that there are serious defects in the majority decision. Concerning the Cahan case, it is probably superfluous and somewhat of an understatement for me to say that I find myself in agreement with the dissenting opinion. Incidentally, that dissenting opinion, written by Justice Spence and concurred in by Justices Shenk and Edmonds, reads in part as follows:

> "Furthermore, I cannot ascertain from the majority opinion in the present case the nature of the rule which is being adopted to supplant the well-established non-exclusionary rule in California."

I mention this to indicate the difficulty of our assignment to solve in a few minutes the myriad and diverse problems in the Pandora's Box to which Judge Bray referred.

If these three members of the Supreme Court are confused and unable to ascertain from the majority opinion the nature of the rule or doctrine of the case, I am wondering how we can be expected to say how the case should be applied. As a precedent or guide, the majority opinion is of little, if any, help. The facts are too meager and inadequate. This, of course, is a conclusion on my part which could be implemented if time permitted.

The letter which I received from Judge Bray described the subject to be considered by this panel as follows:

"How should the doctrine of People v. Cahan be applied? This includes a discussion of whether the federal rule should be applied, the procedure to be adopted, motions in advance of trial to determine admissibility of evidence, and the other questions which naturally follow from the doctrine that evidence secured by unlawful search and seizure is inadmissible."

I construe the subject of this discussion, as stated by Judge Gray, to mean that we are here not to bury Cahan, but to try and find a way of living with him - a way, so to speak, of putting meat on the bare bones of the skeleton and of breathing life into the body with which we are compelled to live whether we like it or not.

However, I would be remiss if I failed to state unequivocally that I disagree with the result reached by the majority opinion, particularly the complete and unqualified reversal of People v. LeDoux and People v. Mayen and the adoption of the exclusion rule as the law of California.

Incidentally, I disagree also with certain remarks in the majority opinion such as, "The courts under the old rule have been constantly required to participate in and, in fact, condone the lawless activities of law enforcement officers" and "a system that permits the prosecution to trust habitually to the use of illegally obtained evidence . . ." I submit that an examination of the records of the thousands of cases tried in our courts and of the records in the thousands of cases which have reached the appellate courts of this state will show that the number of cases is relatively few in which a claim was made that evidence was obtained illegally.

Regardless of one's view as to the wisdom of the exclusion rule, the majority opinion, considered simply as a legal opinion

and as a piece of juristic craftsmanship, is unsatisfactory as a guide to the bench and bar, and to law enforcement officials.

For those inclined to the theory that a case is no better than its facts, it is a poor guide because of the incomplete statement of the material facts and circumstances of the illegal, multi-million dollar, syndicated chain-store gambling operation and conspiracy to which six defendants pleaded guilty and seven others, including Cahan, were convicted.

In spite of the fact that the case involved a colossal organized crime type of criminal conspiracy in which investigations involving many policemen and hundreds of hours were made, no mention is made in the majority opinion as to whether an arrest was made, legal or otherwise, when the officers entered and found the evidence, nor does the majority opinion contain any discussion of facts relevant to the question of whether the officers had reasonable cause to enter for the purpose of making an arrest.

The facts stated in the majority opinion as the basis for the holding with respect to the evidence obtained via dictagraphs are likewise insufficient to serve as an adequate and fair guide or test. According to majority opinion, one of the microphone installations was "surreptitious" which, of course, is a pure conclusion and obviously little, if any help to a trial judge or counsel trying to determine whether the facts of a particular case make certain evidence admissible or inadmissible.

Frankly, I cannot tell from the majority opinion whether it means to hold that <u>any</u> evidence obtained by means of a dictagraph is illegally obtained as a violation of what the opinion refers

to as a constitutional right of privacy, or whether it means to hold Section 653h of the Penal Code unconstitutional.

It is little wonder that Justice Spence and the two concurring Justices are confused and unable to "ascertain from the majority opinion . . . the nature of the rule which was (is) being adopted to supplant the well-established non-exclusionary rule in California."

All of which adds up to the fact that as a precedent, the Cahan case is a poor one and from a "doctrine" standpoint, the task prescribed by Judge Bray of discussing how the Cahan case "doctrine" should be applied is very difficult, if not impossible.

Generally speaking, one might say that the theme, the gist of the doctrine, if you will, of the Cahan case, is as stated by Judge Fox in the recent case of People v. Coleman, namely that evidence obtained by police officers in violation of the federal and state constitutional prohibitions against unreasonable search and seizure is inadmissible. To put it another way, it might be said that the majority opinion in the Cahan case judicially legislated out the age-old, time-tested non-exclusionary rule of evidence and imposed upon California the exclusionary rule with the admonition that the federal cases, with their "needless confusion" and "needless limitations" shall not be binding on California courts. In other words, the Cahan case leaves us in the position of starting from scratch without any specific rules to control the game. We must make them up from day to day as the game progresses.

Under the circumstances, with respect to the application of Cahan or its alleged doctrine, I can only suggest a few areas, situations and problems which should be considered and, if time permits, I may indicate in a general way how they should be handled.

One situation of considerable practical importance to policemen is the matter of consent to entry of a building by police where they do not have a warrant of arrest or a search warrant, and the question of what constitutes implied consent or coercion. In this area, I believe that a more liberal interpretation of consent, and a more limited interpretation of what constitutes implied coercion, than those contained in the federal cases, are needed. *

This involves a situation where a policeman knocks on the door or rings the bell, identifies himself and is admitted, and after such admission searches the premises without objection. The question is whether the evidence obtained under such circumstances is admissible.

Another problem in need of clarification is that of the location from which evidence may be legally seized. For example: A and B are in A's apartment. Officers make a valid arrest and as an incident of the arrest, search and seize evidence in the apartments of both A and B, B's apartment being located in another building. I think that consideration should be given to a more liberal handling of this situation than is contained in the federal cases such as Agnello v. United States, 269 U.S. 20.

---

* United States v. Slusser, 270 Fed. 818 (officers went to defendant's residence and after admittance displayed badge and said they were there to search for liquor. Defendant said, "All right; go ahead." Held, search was not consented to but could be attributed to "peaceful submission" to the officer); Amos v. United States, 255 U.S. 313 (officers were admitted by wife of defendant upon telling her they

Another area of confusion involves the type of evidence which may be legally seized at the time of arrest without a search warrant. Where evidence of guilt, such as records, papers, letters, etc., as distinguished from the means of committing the crime or the fruits of the crime, is obtained by police as an incident of lawful arrest, should such evidence be admissible? I believe that it should. There is no statute now in existence in this state which expressly limits the type of evidence which can be taken as an incident of lawful arrest as in the case of a search warrant. In the absence of a statute expressly limiting what may be taken, the court should hold that any competent, relevant, material evidence is admissible and the law with respect to search warrants should be broadened to conform.

Another area concerns the search of an automobile where an arrest is made for a minor traffic offense, or the search of an automobile for contraband, such as narcotics, counterfeit money, illegally smuggled goods, etc. In the case of the arrest for a minor traffic offense, should the traffic officers or policemen be allowed to search the automobile and the driver and, if he finds evidence of another crime, should it be admissible evidence in the prosecution of the driver or occupant for such other offense?

In the case of the search of an automobile for contraband where the officers have reasonable and probable cause to believe that the automobile carries contraband, should they be allowed to search the occupants for incriminating evidence, and if the same

---

were Revenue Officers and had come to search premises "for violation of the Revenue Act." Held, implied coercion nullified purported consent).

is found, should it be admissible?

Another question in this area is whether, assuming there was reasonable cause to search the automobile and after a search no contraband was found, should a search of the occupants of said automobile be legal and if any evidence is found of an incriminatory nature, should the evidence be admissible in the prosecution of the occupant?

Another area or problem to be considered is who should have a right to raise the point of legality of the search and seizure and of admissibility. For example: if D is in T's home as a guest, officers on information not amounting to reasonable cause enter T's home and see D smoking a cigarette which they recognize as marijuana, assuming that D is arrested, should he be allowed to object to the admission of the testimony of the officer and the seizure of any incriminatory evidence because of the questionable entry of T's house?

Still another problem in need of clarification concerns the situation where the evidence is obtained by federal officers or private persons. As to this, should the federal rule be followed or rejected?

The question also arises of whether there should be different tests for different offenses as, for example, narcotics violations. Should there be a more liberal interpretation of the doctrine of reasonable cause in a narcotics case?

Another problem area involves the circumstances of the arrest and what constitutes such reasonable cause as will legalize a search and seizure incident to such an arrest. This is a wide field and a complex one.

Another area concerns the legality of search warrants and what evidence should be obtainable on a legal search warrant.

In this area, the question arises as to whether records, documents, books, etc., used in the operation of an illegal business, which are not, strictly speaking, a means of committing a crime or the fruits thereof, but are more or less integrated with the business, may be legally seized and admitted in evidence. There is very little case law on this subject in California, in fact, only eight cases. Should the interpretation in this area be strict or liberal, or should it be determined by the Legislature by an amendment to the section of the Penal Code which prescribes the grounds for the issuance of a search warrant and the property which may be taken.

Another problem somewhat collateral in nature concerns an arrest based upon information of an undercover agent and the question of whether the undercover agent must be identified or uncovered,* and the question, if he is not uncovered, whether the arrest based upon his information is legal. Similar questions concern the search warrant and the affidavit upon which it is based.

Another area and problem concerns the factors of time and opportunity to obtain search warrants, and the question of whether or not, if the arrest is legal and a search incident to the arrest without a search warrant is made, whether the evidence obtained upon such search is admissible if it appears that the officer had sufficient time and opportunity to obtain a search warrant.

There are no doubt other areas, situations and problems to be considered, but time does not permit a statement of them.

---

* People v. Gonzales, 136 ACA 475 (Oct. 21, 1955) Deputy Sheriff need not disclose name of confidential operator who introduced him to defendant suspected of being a narcotic peddler.

Suffice to say it will take a long time and numerous decisions involving a wide variety of factual situations and the application of plenty of common sense to provide adequate guidance for trial courts, attorneys and police.

Concerning a procedure before trial to determine the admissibility of evidence such a motion to suppress evidence, federal rules provide for a motion to suppress. The application of this rule in the federal courts has been anything but uniform and consistent. The same is true in state courts which have the exclusion rule and the motion to suppress procedure.

However, in a jurisdiction where the exclusion rule prevails, I believe the law and rules of court should provide for motion to suppress and fix a time period before trial not later than which such motion may be made excepting, of course, the situation where the defendant or counsel learn of the evidence for the first time later.

In conclusion, may I say that recently I discussed the exclusion rule with two eminent authorities on criminal law and procedure, one Professor Inbau, Professor of Criminal Law at Northwestern University Law School, Chicago, the other, Professor Waite, Professor of Criminal Law, Michigan University Law School. Illinois and Michigan have had the exclusion rule for some time, plenty of time in which to appraise its effect.

Both Professors Inbau and Waite unqualifiedly say that the exclusion rule has utterly failed in these states to accomplish its avowed purpose of disciplining police. Cases have had to be dismissed because of the manner in which otherwise legal and relevant

evidence was obtained. The ultimate result being that the courts were discredited and blamed by the man on the street who did not understand the legal technicalities involved, which confirms the thinking of such authorities as Wigmore, Mr. Justice Cardozo, Chief Justice Taft, Mr. Justice Jackson and others, which confirms also the wisdom, down through the centuries since the Magna Carta, of the judges of the countries of the British Empire and the courts of thirty states of the United States, in approving and adhearing to the rule of non-exclusion.

REPORT OF J. FRANK COAKLEY, DISTRICT ATTORNEY, ALAMEDA COUNTY, TO THE ASSEMBLY JUDICIARY SUB-COMMITTEE ON ILLEGAL SEARCHES, SEIZURES AND THE LAWS OF ARREST

On April 27, 1955 the Supreme Court of California handed down its decision in People vs. Cahan. In their decision, which cast aside the precedents of fifty years of law enforcement in this State, the court took the position that adoption of the exclusionary rule was the only satisfactory way to secure compliance with the constitutional provisions on the part of police officers. They said: "The courts have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers .....out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business'." (1)

Professor Edward Barrett, of the University of California, in his recent article in the California Law Review, terms these "moralistic notions", and we join with him when he asks, "Is not the court which excludes illegally obtained evidence in order to avoid condoning the acts of the officer, by the same token condoning the illegal acts of the defendant?" (2)

It is quite apparent that in the Cahan case the court gave very little consideration to the possible adverse effects of the exclusionary rule upon law enforcement. Recognizing the needless confusion, needless refinements, distinctions and limitations which have accompanied the federal exclusionary rule, the court nevertheless confidently promised the "development of

---

(1) 44 AC 461, 472
(2) 43 California Law Review, Vol. 4, p. 582 (October 1955)

workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime." (3)

Today, nearly nine months later, we are still waiting for workable rules, just as the federal authorities have been waiting in vain since 1914 for a set of workable rules under the federal rule of exclusion. (4)

Since the Cahan case, the Supreme Court of California has decided some eight or nine search and seizure cases. Many of these were taken over by the Supreme Court from the District Courts of Appeal for the ostensible purpose of fashioning and defining some of these workable rules. To date we find it painfully clear in these decisions that, as Justice Edmonds stated in his dissent in Cahan, "We cannot ascertain the nature of the rule that is being adopted." In their recent decisions, the Supreme Court, by use of vague and equivocal language, has failed to fashion or develop workable rules to be followed by law enforcement officers in the areas the court has discussed thus far. For example, In People vs. Michael, 45 AC 776, in discussing the matter of consent searches, the court said: "We are not unmindful of the fact that the appearance of four officers at the door may be a disturbing experience, and that a request to enter made to a distraught or timid woman might under certain circumstances carry with it an implied assertion of authority that the occupant should not be expected to resist." (5)

---

(3) 44 AC, 477
(4) The Federal Rule of Exclusion started with Weeks vs. U.S. 232 US, 383 (1914)
(5) 45 AC 776, 779

Does this case give us any workable rule or indeed any rule at all regarding consent searches? Must the officer ascertain whether the person he asks consent of is a timid person before he proceeds to ask consent?

In another area, discussing the right of an officer to question persons at night, the court says, in People vs. Simon, 45 AC, 671: "There is of course nothing unreasonable in an officer's questioning persons outdoors at night and it is possible that in some circumstances even a refusal to answer would, in the light of other evidence, justify an arrest. Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from attack with a hidden weapon, certainly a search so intensive as that made here (officer reached in defendant's pocket and found marijuana cigarette) could not be so justified." (6)

Does this kind of vague language lay down any sort of workable rule for officers to follow in questioning persons on the streets at night?

In still another area, the court has, in effect, eliminated subsection (2) of Section 836 of the Penal Code as an effective means of arrest without warrant. In People vs. Brown, 45 AC, 666, People vs. Simon, supra and People vs. Boyles, 45 AC, 677, the court held that a search in which evidence of guilt of a felony is found cannot be utilized to justify an arrest for such felony, and if the arrest is therefore unlawful, the search is unreasonable. Is this a workable rule?

In People vs. Martin, 45 AC 780, the court ruled that

---

(6) 45 AC, 671, 675

it is not the violationof a particular defendant's rights which renders evidence against him inadmissible, but rather, that admissibility depends on the reasonableness of the search, on the theory that the government shall not profit by its own wrong. How can it be said that the officers committed a wrong if no one's rights were violated?

In People vs. Tarantino, 45 AC 617, the court has intimated, but not made clear, that Section 653(h) of the Penal Code is probably unconstitutional, or that at most its provisions simply protect officers making microphone installations from being criminally prosecuted under its own terms. Again, it must be asked whether the decisions in Tarantino and Cahan have laid down any workable rules with regard to microphone evidence.

So it is with the other decisions by the Supreme Court since Cahan, and so it will be for some time to come, if we are to look to the Supreme Court for clarification and the fashioning of workable rules.

If we must live with the exclusionary rule, what, then, is necessary in order that police, prosecutors and trial courts may have some practical guide to follow. How can rules be fashioned which will more clearly outline the limits within which an officer must work and yet provide for efficient law enforcement against the criminal?

A practical and judicious approach, it would seem, is to draft a comprehensive legislative program which we can expect the courts to accept and which will at the same time, provide adequate weapons for law enforcement. Such a program has been long needed, even before the advent of the exclusionary rule. The adoption of the rule in California has made imperative a modernization of the laws of arrest and search

warrants, among others.

We can examine our experience in law enforcement and point out the areas where the exclusionary rule will not work in harmony with existing statutes. We can show the need for additional legislation where the exclusionary rule has left us unarmed. Our primary need is a sharpening of our most effective weapons, the laws of arrest and the search warrant laws, which were enacted in 1872, and are now hopelessly dulled and inadequate through age and the abandonment of the non-exclusion rule.

To illustrate, we have chosen some seven areas where we are finding that existing law is not adequate, and will indicate the kind of remedial legislation which appears needed:

(1) SEARCH WARRANT LAW

If we are to be required in many cases to obtain search warrants, our search warrant law needs to be brought up to date, particularly in these areas:

(a) Removal of the limitations on the types of evidence which can be sought for under a search warrant.

Section 1524 of the Penal Code now provides only for search for stolen property, property used as the means of committing a felony, and property possessed with intent to use it as a means of committing a public offense. There is no provision for recovery of other kinds of evidence, such as the clothing worn by a robber, or other means of identity such as fingerprints, or documentary evidence such as books and records, etc., all of which might be as important as evidence as the gun used or the loot stolen.

(b) Removal of the limitations on night search warrants.

At present, search warrants cannot be served at night unless the allegations in the affidavit are positive that the property sought is on the person or in the place to be searched. Reasonable cause to believe the property is there is insufficient under Section 1533 Penal Code.

(c) Clarification of the requirements of the affidavit.

Sections 1525, 1526 and 1527 now are uncertain and vague. Affidavits and depositions are spoken of interchangeably. The requirement of particularly describing the property to be seized is unrealistic. For example, if a warrant describes three stolen articles, and in serving the warrant another stolen article is found, should it not also be recoverable, or must the officers return and draw up a new warrant, etc?

(d) Forcible Entry

Section 1531 Penal Code requires the officer serving the warrant to give notice of his authority and purpose and be refused admittance, before he is entitled to make forcible entry. Provision should be made for entry without notice where there is reasonable cause to believe commission of an offense is in progress, or that the evidence will be destroyed. In narcotics cases, for example, officers will hear the flush of the evidence down the toilet long before they will hear the peddler inviting them in in response to their knock and announcement of their authority and purpose.

(e) Affidavit based on information.

Provision should be made for the sufficiency of an affidavit based on information from an informant or from other sources. Such information is apparently sufficient upon which to base an arrest (People vs Boyles, 45 AC 677) but should also be spelled out in search warrant laws.

(2) LAWS OF ARREST

This major area is presently under study by several committees, which are examining the Uniform Arrest Act and other possible legislation on this subject. Without going into detail then, regarding the requirements in this field, suffice to say that the work of these committees should be closely integrated with any program of proposed legislation in the field of search and seizure.

(3) SEARCHES INCIDENT TO LAWFUL ARREST.

The Cahan case and later Supreme Court decisions have left unclear many problems regarding searches incident to arrest:

(a) Extent of search

In this area it is not clear how extensive a search may be made. Provision should be made for extension of a search incident to arrest to all of the premises in which a person is arrested to which he has access or over which he exerts control. The federal cases and cases in other states are full of "needless limitations" in this area. (7) Logically, such searches should be permitted to extend to garages

---

(7) See, for example: Aguello vs. U.S. 269, US 20; People vs. Conway, 195 NW 679 (Michigan); U.S. vs. Steck, 19 F (2d) 161; Fowler v. State, 22 SW (2d) 935

and outbuildings to which defendant has access or control. This might well be further extended to cover search of any premises over which defendant exercises control. For example, if a narcotics violator is lawfully arrested on the street, it would seem logical to permit an immediate search of his room where evidence of use or preparation of narcotics for sale are likely to be found, such as hypodermic outfits, milk of sugar, capsules or bindles, etc.

(b) Similar to the problem discussed under search warrant law, there is need for clarification as to the type of evidence which can be seized incident to a lawful arrest. Again the federal cases seem to impose an illogical limitation on such searches, making it doubtful if evidence of a crime other than that for which the arrest is made would be admissible.(8) Legislation in this area could spell out the propriety of seizing evidence of any crime, in a search incident to lawful arrest.

(c) Provision should be made to justify searches and seizures incident to lawful arrest regardless of time or opportunity to obtain a search warrant. This rule finds basis in U.S. vs. Rabinowitz, 339 US 56 wherein the Federal Supreme Court held that despite a fifteen day period in which the officers could have obtained a search warrant, there was nevertheless a lawful arrest and search incident thereto. The mere fact that the officers chose to spring the trap at the opportune time, without a search warrant, did not render the search unreasonable.

---

(8) See Lefkowitz vs. U.S. 285 US 452; U.S. vs. 1,013 Crates of Empty O.S.Whiskey Bottles, 8. 52 F(2d) 49

(d) It is not presently clear, and should be spelled out, that an arrest for a traffic offense shall justify a search incident thereto, just as does any other arrest. For example, if a car is being driven in an erratic manner, the officer stopping such car ought to be permitted to check the car and driver for evidence of use of narcotics or liquor.

(4) SEARCHES WITHOUT WARRANT AND WITHOUT ARREST.

(a) Under present Federal rules, a search of an automobile is justified without arrest or search warrant where there is reasonable cause to believe that such automobile is carrying contraband. (9) This rule should be spelled out as law in California, with the further proviso that such search should include a search of the occupants. The present Federal rule, which thus far is our only guide, is unreasonable and unrealistic, holding that mere presence in a suspected car does not justify search of the person. (10) Take the situation where an officer receives reliable information that a certain automobile is being used to transport narcotics, and sees such automobile arrive at a spot where a delivery of narcotics is to take place. Certainly under those circumstances a search of the automobile should include a search of the occupants.

(b) Search of other areas or premises should be permitted by law, without warrant or arrest, where there is reasonable cause to believe evidence is present,

(9) Husty vs. U.S. 282 US 694; Carroll vs. U.S. 267 US 13
(10) U.S. vs. DiRe, 332 US 581

where there is insufficient time or opportunity to get a search warrant and where there is reasonable cause to believe such evidence might be removed or destroyed before a warrant could be obtained.

(5) CONSENT SEARCHES

The indications by the California Court in People vs. Michael, 45 AC 776, as mentioned previously, and the confusion created by the numerous federal cases and cases from other jurisdictions on this subject indicate a need for clarification in this field by legislation. For example, minority jurisdictions have frequently held that persons under arrest are incapable of giving a voluntary consent to a search because of the "implied coercion" involved. (11) Such a rule should not be permitted to develop here. Perhaps legislation in this field should provide for a presumption of voluntary consent where a search is made without objection or where consent is expressly or impliedly given. The burden would thus shift to the defendant to show coercion or involuntariness of the consent.

(6) SEARCH AND SEIZURE BY PRIVATE PERSONS OR BY FEDERAL AGENTS.

The very basis of the Cahan case is that the State should not profit by its own wrong. In the Tarantino case, supra, the court suggested, but did not spell out, that evidence obtained by a private person acting in a private capacity might not be held inadmissible. This should be more clearly stated in statute form so as to prevent the State from being penalized for errors of other agencies or private persons.

(7) PRE-TRIAL PROCEDURE

In order to eliminate much of the legal red tape involved

---

(11) Pritchett vs. State, 143 Pac (2d) 622, (Oklahoma)

in settling search and seizure questions, there is need for legislation to provide for a motion to suppress evidence and fix a time period before trial, not later than which such motion may be made, excepting of course where the facts were not known to defendant or counsel at the time. Legislation in this area should also limit the making of such motions to the defendant and require as a basis for such motion an affirmative showing by the defendant that he or his property have been subjected to unreasonable search or seizure. A procedure similar to that in federal courts might provide a basis for such legislation. (12)

Such rules should also provide for a right of appeal by the People from the decision on the motion.

A clear-cut procedure in this area would avoid the lack of uniformity and inconsistency found in the federal practice, often resulting in duplication of the same arguments in motions to suppress, at time of trial and again on motion for new trial.

There are no doubt many other areas where only legislation can provide reasonable, workable rules for officers, prosecutors and the courts to apply.

In approaching these problems there is a need for coordination and integration of proposed legislation, not simply in the field of search and seizure, but also in the related realm of arrest, right to bail, production of defendant before a magistrate and similar areas. For example, the Supreme Court has recently raised a doubt as to the proper application of Section 825 Penal Code, which requires production of a defendant before a magistrate without unnecessary delay. (13) The court has made it clear that the outside limit to such delay is two

---

(12) Rule 41(e) Federal Rules of Criminal Procedure, Title 18 USC
(13) Dragna vs. White, 45 AC 492

days, but within that period it becomes questionable whether routine police procedures such as holding line-ups, contacting and questioning witnesses and interrogating the defendant, are unnecessary delays.

The area just referred to is the subject of a study by Judge Philip H. Richards of the Los Angeles County Superior Court. (14)

At least some of the other areas mentioned are now undergoing survey and study by Attorney General's committees, State Bar committees, and others. The information obtained through these studies should be summarized and integrated into a comprehensive legislative program, which can ascertain the areas where there is agreement on the need for legislation and the scope of those needs.

Preliminary drafts of this program should then be prepared and thoroughly studied, reviewed and finally presented for passage.

Such a legislative program could not be expected to provide, as it has been termed a "ready litmus-paper test" covering each and every situation an officer will face, but it should provide a practical working approach, in the form of modern laws, to enforcement in those areas where the rules now are vague, conflicting, or even non-existent.

If we are to be required to operate under the exclusionary rule, the fact remains that without a correlated program of legislation, we are going to be without adequate workable rules for some time to come. Without such rules, the police are hesitating to act, and when they do act, are more frequently

---

(14) "The Problem of Bail on Felony Arrests Made Without a Warrant", by Philip H. Richards, Judge of the Superior Court, Los Angeles County

than not being challenged on every technical point, resulting as we have seen in the spectacle of criminals being freed despite clear and convincing evidence against them.